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TRANSCRIPT OF RECORD ON APPEAL

TO THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

EDWIN J. BOHNEN, Executor of the Estate of MARY A. BOHNEN, and individually; THEODORE G. BOHNEN, and VIRGINIA E. BOHNEN,
Plaintiffs-Appellees,

vs.

CARTER H. HARRISON, individually and as Collector of Internal Revenue,
Defendant-Appellant.

No. 49 C 362

From the United States District Court for the Northern District of Illinois, Eastern Division.

PLEAS had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of November (it being the 5th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-One and of the Independence of the United States of America the 176th Year.

Present: Honorable John P. Barnes, District Court.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. LaBuy, District Judge.
Honorable J. Sam Perry, District Judge.
Honorable William H. Holly, District Judge.

Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Friday, November 9, 1951.
Court met pursuant to adjournment.
Present: Honorable William J. Campbell, Trial Judge.

1 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Edwin J. Bohnen, Executor of the Estate of Mary A. Bohnen, and individually; Theodore G. Bohnen and Virginia E. Bohnen,
Plaintiffs,
vs.
Carter H. Harrison, individually and as Collector of Internal Revenue,
Defendant.
No. 49 C 362

STATEMENT REQUIRED BY RULE 10(b) OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, EFFECTIVE AUGUST 1, 1950.

The style of the court and the title of the case are exhibited in the above caption.

March 1, 1949, suit was commenced by filing a complaint.

June 9, 1949, Answer of defendant filed.

October 4, 1949, pre-trial conference held.

October 9, 1950, motion of plaintiffs for judgment on the pleadings.

August 15, 1951, Rule on plaintiffs to file copies of insurance policies referred to in complaint.

August 22, 1951, filed insurance policies pursuant to rule of court of August 15, 1951.

September 25, 1951, entered memorandum and order of court granting plaintiffs' motion for judgment on the pleadings; judgment to enter for plaintiffs. Plaintiffs to submit form of judgment order.

November 9, 1951, hearing before U. S. District Judge William J. Campbell as to the correctness of the computations. Filed defendant's Exhibit No. 1 (computation of Bureau of Internal Revenue). Judgment entered for plaintiffs for $22,427.47 plus interest from December 23, 1944 at 6% as to $12.57, and from September 11, 1944 as to balance.

January 8, 1952, filed notice of appeal.

Otto Kerner, Jr.
Otto Kerner, Jr.,
United States Attorney,
Attorney for Defendant.

2 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • Caption No.—Case No. 49 C 362 • •

Be It Remembered, that on to-wit, the 1st day of March, 1949, the above-entitled action was commenced by the filing of the following Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

3 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • Caption No.—Case No. 49 C 362 • •

Plaintiffs demand a Jury Trial.

COMPLAINT

Plaintiffs, Edwin J. Bohnen, Executor of the Estate of Mary A. Bohnen, and individually, who resides at 720 Locust Street, Winnetka, Illinois, Theodore G. Bohnen, who resides at 67 Tunstall Road, Scarsdale, New York, and Virginia E. Bohnen, who resides at 7641 Phillips Street, Chicago, Illinois, by their attorneys, Edward H. McDermott, William M. Emery, Leonard S. Schmitz, and Jerome H. Burns, state:

1. The Court has jurisdiction of this matter under Title 28, United States Code, Section 1340, and all other laws of the United States in that behalf;

2. Mary A. Bohnen, died testate on June 29, 1942, leaving her estate equally to her three children, the plaintiffs herein;

3. The plaintiffs as heirs and devisees of Mary A. Bohnen, are the sole and absolute owners of the claim
4 herein presented, and have made no assignment of said claim or any part thereof. No other suit or process by the plaintiffs is pending against any other person or against the United States for or in respect of the plaintiffs' claim herein set forth;

4. Edwin J. Bohnen was appointed executor of the estate of Mary A. Bohnen by the Probate Court of Cook

County, Illinois, on July 13, 1942, and acted in that capacity until he was duly discharged on July 23, 1943;

5. An estate tax return for such estate was timely filed with the defendant as Collector as aforesaid and an estate tax of $6,173.25 paid by the executor, Edwin J. Bohnen to the defendant;

6. Thereafter, the Commissioner of Internal Revenue assessed an estate tax deficiency in the amount of $25,497.53 against the estate of Mary A. Bohnen;

7. On August 14, 1944, Carter H. Harrison, the defendant herein, was the Collector of Internal Revenue for the First District of the State of Illinois;

8. On August 14, 1944, Edwin J. Bohnen, executor of the estate of Mary A. Bohnen, paid to Carter H. Harrison, Collector of Internal Revenue, $25,497.53, the amount of the deficiency assessed against the estate of Mary A. Bohnen, and on the same date paid to Carter H. Harrison, Collector of Internal Revenue, $1,393.38, as interest on such deficiency;

9. On October 4, 1945, Edwin J. Bohnen, executor of the estate of Mary A. Bohnen, filed a claim for refund
5 for $26,890.91, the amount of the above $25,497.53 deficiency and $1,393.38 interest, with the Collector of Internal Revenue for the First District of the State of Illinois;

10. The Commissioner of Internal Revenue, by letter sent from Washington, D. C., dated March 3, 1947, denied in full such claim for refund;

11. In 1935, after receiving assurances from their mother that she was making gifts to them, plaintiffs, in their own names, applied to The Equitable Life Assurance Society of the United States, a corporation, for a policy of insurance on the life of their mother. The insurance company required that an annuity contract be purchased before it would issue the life insurance policy. On October 25, 1935, The Equitable Life Assurance Society of the United States issued an annuity contract to Mary A. Bohnen, and on the same date issued to plaintiffs a single premium life insurance policy in the face amount of $72,000 on the life of Mary A. Bohnen. By the terms of the policy, the plaintiffs were the "Owners" with all rights in the policy vested in them, or their descendants. At the request of the plaintiffs, their mother's gift in the amount of $53,717.04, was paid directly to The Equitable Life Assurance Society of the United States by Mary A. Bohnen,

rather than by formal transfer to the plaintiffs first, and then in turn through transfer by them of the premium cost to the insurance company;

12. Mary A. Bohnen filed a timely gift tax return for the year 1935, including among other gifts, the gift of
6 $53,717.04 used by the plaintiffs in purchasing the above life insurance policy;

13. The Commissioner of Internal Revenue erroneously included the proceeds of the above life insurance policy, $72,094.81, in the gross estate of Mary A. Bohnen. The basis for such inclusion, and for denial of the claim for refund, by the Commissioner of Internal Revenue, was that the life insurance and annuity were one transaction and constituted a transfer intended to take effect in possession or enjoyment at her death, or under which she reserved the income for her life, within the provisions of Section 811(c) of the Internal Revenue Code;

14. The collection, by Carter H. Harrison, Collector of Internal Revenue, of the tax and interest pertaining to the inclusion in the gross estate of Mary A. Bohnen of the proceeds of the above life insurance policy was erroneous and illegal. Mary A. Bohnen, with regard to the above insurance policy, made no transfer, within the provisions of Section 811(c) of the Internal Revenue Code, intended to take effect in possession or enjoyment at her death, or under which she reserved the income for her life;

Wherefor, Plaintiffs demand judgment against the Defendant, individually and as Collector as aforesaid, in the sum of $21,692.14, or for such other amount as may be legally payable as a result of the erroneous inclusion of the proceeds of the above life insurance policy in the gross estate of Mary A. Bohnen, together with interest com-
7 puted thereon from the date of overpayment.

In addition, plaintiffs have incurred attorneys fees in connection with the matter herein which constitute a legitimate deduction from the gross estate of Mary A. Bohnen. The exact amount of such fees must await the termination of this matter;

Wherefor, Plaintiffs demand judgment against the Defendant, individually and as Collector as aforesaid, for the amount of tax together with interest thereon resulting from the deduction from the gross estate of Mary A. Bohnon of the attorney fees incurred herein.

Leonard S. Schmitz
Leonard S. Schmitz

Jerome H. Burns
Jerome H. Burns

Edward H. McDermott
William M. Emery
Leonard S. Schmitz
Jerome H. Burns

111 West Monroe Street
Chicago 3, Illinois
Telephone: Franklin 2-2002

Attorneys for Plaintiffs

8 And afterwards on, to wit, the 9th day of June, 1949 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Answer in words and figures following, to wit:

9 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * Caption No.—Case No. 49 C 362 * *

ANSWER

Defendant answers as follows:

I.

Admits the allegations contained in paragraph 1 of the complaint.

II.

Admits the allegations contained in paragraph 2 of the complaint.

III.

Admits the allegations contained in paragraph 3 of the complaint.

IV.

Admits the allegations contained in paragraph 4 of the complaint.

V.

Admits the allegations contained in paragraph 5 of the complaint.

VI.

Admits the allegations contained in paragraph 6 of the complaint.

VII.

Admits the allegations contained in paragraph 7 of the complaint.

VIII.

Denies all the allegations contained in paragraph 8 of the complaint, except admits or avers that the deficiency in federal estate taxes of $25,497.53 plus interest thereon in the sum of $1,456.85, or a total of $26,954.38, was paid as follows: On September 11, 1944, there was paid $26,941.81 and on December 23, 1944, there was paid $12.57.

IX.

Admits the allegations contained in paragraph 9 of the complaint.

X.

Admits the allegations contained in paragraph 10 of the complaint.

XI.

Denies all the allegations contained in paragraph 11 of the complaint, except admits or avers that on or about October 14, 1935, the Equitable Life Assurance Society of the United States issued a single premium so-called life insurance policy in the face amount of $72,000 on the life of Mary A. Bohnen, policy No. 9896003, and on the same date and in connection therewith the Equitable Life Assurance Society of the United States issued to Mary A. Bohnen a life annuity contract No. 9896002; that the annuity con-
11 tract provided for an annual payment to Mary A. Bohnen of $1,618.03 beginning on October 14, 1935. Defendant is informed and believes and upon such information and belief avers that Mary A. Bohnen, decedent herein, paid on or about October 14, 1935, a single premium of $53,717.04 to the Equitable Life Assurance Society of the United States for the so-called life insurance policy, and on the same date Mary A. Bohnen, decedent herein, paid to the Equitable Life Assurance Society of the United States a premium on the annuity contract of $22,602.96; defendant admits that the insurance company required that the annuity contract be purchased before the company would issue

the so-called life insurance policy, and avers that said contracts were issued, without decedent having taken a physical examination; defendant further avers that the so-called life insurance policy was in the nature of an investment as distinguished from life insurance and was, therefore, taxable in decedent's estate under the provisions of Section 811 (c) of the Internal Revenue Code as a transfer by decedent during her lifetime under which decedent retained for her life the right to the income from the property transferred.

XII.

Denies all the allegations contained in paragraph 12 of the complaint, except defendant admits or avers that Mary A. Bohnen, decedent herein, filed an amended gift tax return, signed and sworn to by her on May 15, 1936, with the Collector of Internal Revenue for the First District of Illinois on or about May 25, 1936, in which decedent reported gifts during the calendar year 1935 to Theodore G. Bohnen, Edwin J. Bohnen, decedent's sons, and Virginia E. Bohnen, decedent's daughter, included in which was a gift to each of the donees in words and figures quoted from the return as follows: "⅓ Int. in single pay't Life Ins. Policy 10/14/35 * * * All gifts for love and affection"; defendant avers that on or abqut the same date Edwin J. Bohnen and Virginia E. Bohnen filed with the Collector of Internal Revenue for the First District of Illinois, amended donee's information returns of gifts for the calendar year 1935 duly executed by said donees, each of which return contains the following:

12

> ⅓ interest in single prem. Life Ins. Policy 10/14/35 * * *
>
> I hereby give notice of the herein-described property received from the above-named donor [Mrs. Mary A. Bohnen], and certify that all the information given herein is correct, to the best of my knowledge and belief.

Defendant further alleges that a federal estate tax return was filed with the Collector of Internal Revenue for the First District of Illinois, on behalf of the estate of Mary A. Bohnen, deceased, by Edwin J. Bohnen as executor on or about July 1, 1943, which return, duly executed under oath by Edwin J. Bohnen, contained, under Schedule D thereof, the following:

Single payment life policy absolute owner form No. 9896003 of Equitable Life Assurance Society, Theodore G. Bohnen, Edwin J. Bohnen and Virginia E. Bohnen equal owners and beneficiaries. See form 12 attached. On 10/14/35, as shown in gift tax return referred to in Schedule G herein, decedent gave this policy to Theodore G. Bohnen, Edwin J. Bohnen and Virginia E. Bohnen in equal shares.

XIII.

Admits the allegations contained in paragraph 13 of the complaint, except denies that the proceeds of the so-called life insurance policy was erroneously included in the taxable estate of Mary A. Bohnen, deceased, and avers that the proceeds of the contract were properly included in decedents taxable estate under Section 811 (c) of the Internal Revenue Code.

13

XIV.

Denies all the allegations contained in paragraph 14 of the complaint.

Wherefore, having fully answered, defendant prays judgment and costs.

Otto Kerner, Jr.,
United States Attorney.

14

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * Caption No.—Case No. 49 C 362 * *

AFFIDAVIT OF SERVICE

State of Illinois }
County of Cook } ss

LeRoy R. Krein, being first duly sworn, on oath deposes and says that he is an Assistant United States Attorney for the Northern District of Illinois; that on the 9th day of June, 1949, he mailed a copy of the foregoing Answer to Jerome H. Burns, Esquire, 111 West Monroe Street, Chicago, Illinois, one of the attorneys for the above-named plaintiffs.

LeRoy R. Krein

Subscribed and sworn to before
me this 9th day of June, A. D. 1949.
Ruth J. Quinlan
Notary Public

15 And afterwards on, to wit, the 9th day of October, 1950 came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Motion for Judgment on the Pleadings in words and figures following, to wit:

16 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

• • Caption No.—Case No. 49 C 362 • •

MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs, by their attorneys, move the court for judgment on the pleadings under Rule 12 (c) of the Rules of Civil Procedure for the District Courts of the United States, in favor of the plaintiffs for their entire claim, and in support of the filing of this motion at this time, state as follows:

1. That the complaint and answer herein raise substantial questions of fact and that both the defendant and the plaintiffs have filed trial briefs upon the assumption that the determination of this cause depends solely upon determination of the controverted factual questions.

2. That in doing further legal research in preparation for trial, plaintiffs' attorneys have concluded that the government's position is unfounded in law, irrespective of the manner in which the controversies of fact raised by the pleadings may be decided.

3. That plaintiffs and their attorneys believe that the filing of the present motion will be to the best interests of all parties and of the court, and will, if decided in favor
17 of the plaintiffs, relieve the court of the necessity of a trial of the facts.

McDermott, Will & Emery
George S. Stansell
James A. Dunkin
Attorneys for Plaintiffs

McDermott, Will & Emery
111 West Monroe Street
Chicago 3, Illinois
Franklin 2-2002

18 And on the same day, to wit, on the 9th day of October, 1950, being one of the days of the regular

October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

19 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

* * Caption No.—Case No. 49 C 362 * *

ORDER

This matter coming on to be heard on motion of the plaintiffs' attorneys, due notice having been served upon defendant through his attorneys,

It Is Ordered as follows:

1. That leave be given to plaintiffs to file at this time a motion for judgment in the pleadings, pursuant to rule 12 (c) of the Rules of Civil Procedure for the United States District Courts.

2. That the time of plaintiffs to file their brief in support of said motion, pursuant to rule 7 of the Rules of Practice of this court, shall be extended until ten (10) days from date of this order.

3. That leave is given to plaintiffs to withdraw their trial brief heretofore filed with respect to said cause, with leave to file an amended trial brief in the event the court ultimately denies their said motion for judgment on the pleadings.

20 4. That leave is granted McDermott, Will & Emery, George S. Stansell, and James A. Dunkin to file their appearances as additional counsel for the plaintiffs.

Enter:

John P. Barnes
Judge

Dated: October 9, 1950.

21 And afterwards on, to wit, the 22nd day of August, 1951 there were filed in the Clerk's office of said Court a certain Annuity Policy and Life Insurance Policy Issued By Equitable Life Assurance Society of United States, in words and figures following, to wit:

22 McDERMOTT, WILL & EMERY
111 West Monroe Street
Chicago 3
August 22, 1951

Mr. Roy H. Johnson, Clerk
United States District Court
Room 726, United States Court House
Chicago 3, Illinois
Dear Sir:

Pursuant to the order entered on August 15th by Judge Campbell in the case entitled Edwin J. Bohnen, et al *vs.* Carter H. Harrison, No. 49 C 362, I enclose one copy each of the annuity policy and of the life insurance policy issued by the Equitable Life Assurance Society of the United States on October 25, 1935 in which Mary A. Bohnen is the annuitant and the insured, respectively. These are the policies referred to in the Complaint filed in this case.

Yours respectfully,
James A. Dunkin

JAD/dg
Enclosures
cc Otto Kerner, Jr.,
United States Attorney
23 Copy

Policy No. 9,896,002

THE EQUITABLE
LIFE ASSURANCE SOCIETY
OF THE UNITED STATES

A Mutual Company Organized July 26, 1859
Hereby Agrees To Pay
An Annuity
To —Mary A. Bohnen—
(Herein called the annuitant)
subject to the conditions hereinafter stated,
in annual payments

of —Sixteen Hundred Eighteen and 03/100—Dollars each.

The first annual annuity payment shall be due on the fifteenth day of October, nineteen hundred and thirty-six, if the annuitant is then living. Subsequent payments shall be due annually thereafter during the life time of the annuitant, terminating with the last payment preceding the death of the annuitant. In event of the death of the annui-

tant prior to the due date of the first annuity payment, no annuity payment shall be made under this contract, nor shall the Society refund the consideration paid for this contract or any part thereof.

This contract is issued in consideration of the payment to the Society of Twenty-Two Thousand Six Hundred Two And 96/100 Dollars.

The provisions of the subsequent pages hereof form a part of this contract as fully as if recited at length over the signatures hereto affixed. This contract is executed at the Home Office of the Society in New York on its date of issue, the twenty-fifth day of October, 1935.

Examined by
O.W.
Thomas T. Parkinson President.

Alexander McNeill Secretary
24 Copy

Annuity Application

TO THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

Application is hereby made for a Life Annuity providing for Annual payments of $1,618.03 each, with a Single premium of $22,602.96 payable in advance.

The premium has been paid on the 14th day of October, 1935.

Annuitant upon whose life Annuity is to depend } Mary A. Bohnen Female

Widowed Mary A. Neckerman (Maiden name)

Who resides at 6817 Bennett Avenue, Chicago, Cook County, Illinois.
Whose occupation is Housewife.
Who was born at Chicago, Cook County, Illinois, on the 14th day of December, 1873, and whose age at last birthday was therefore 61 years.

Annuity to be payable } to Mary A. Bohnen

Residing at 6817 Bennett Avenue, Chicago, Cook County, Ill.

Dated at Chicago, Illinois, October 14th, 1935.

Mary A. Bohnen
Soliciting Agent
Courtenay Barber
Agency

25 Copy

Participation in Dividends. The proportion of divisible surplus accruing upon this contract shall be ascertained annually. At each anniversary of the Register date of this contract, if an Annuity payment be then due, or, if no Annuity payment be then due, at the Annuity payment due date next following such anniversary, any surplus apportioned by the Society to this contract as a Dividend shall be paid to the person entitled to receive the Annuity payment then due. Dividends will cease with the last Dividend due as above prior to the death of the Annuitant, and no Dividend will be allowed for the period elapsed since the last Dividend due date preceding the Annuitant's death.

Method of Payment. The Society will make each Annuity payment by check. Evidence satisfactory to the Society of the survival of the Annuitant on the due date of each Annuity payment must be furnished; where the check for such payment is drawn to the order of the Annuitant, the Annuitant's personal endorsement thereon will be accepted as evidence of such survival.

Incontestability and Freedom of Travel, Residence and Occupation. This contract shall be (a) incontestable after it has been in force for a period of one year from its date of issue, and (b) free from restrictions on travel, residence, occupation or military or naval service.

Assignments. No assignment of this contract shall be binding upon the Society or be deemed to be in force unless in writing and until filed at its Home Office. The Society assumes no responsibility for the validity of any assignment.

Age. If the age of the Annuitant has been misstated, the benefits hereunder shall be adjusted in amount to correspond with the benefits for the Annuitant's correct age at the rates charged by the Society at the Register date of this contract. Overpayments, if any, by the Society, shall, with interest at the rate of six per cent. (6%) per annum, be charged against any benefits falling due after adjustment.

Basis of Reserve. The reserve for which funds are to be

held upon this contract shall be not less than that computed upon the Combined Annuity Tables with interest at 3%.

The Contract. This contract, and the application therefor, a copy of which is endorsed hereon or securely attached hereto, constitute the entire contract between the parties. All statements made by the Annuitant or Purchaser shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall avoid this contract or be used in defense of a claim hereunder unless contained in the written application therefor and a copy of such application is endorsed hereon or attached hereto, when issued.

No person except the President, a Vice-President, the Secretary, the Treasurer, a Registrar or an Assistant Registrar of the Society has power to modify this contract.

All sums payable by the Society under this contract shall be payable at its Home Office in the City of New York.

ATTACH TO APPLICATION
NOV 28 1938

Equitable Life Assurance Society
393 Seventh Avenue
New York, N.Y.

Gentlemen:

We, EDWIN J. BOHNEN, THEODORE G. BOHNEN and VIRGINIA E. BOHNEN, the joint Owners of policy No. 9,896,008 issued on the life of Mary A. Bohnen, hereby request that the dividend for the year 1939 and all subsequent dividends under said policy, be paid in cash and that the checks in payment of such dividends be drawn to the order of said VIRGINIA E. BOHNEN alone.

ELECTION NOTED
ON RECORD IN OFFICE.
38
38 N.Y.S.

This election is to remain in force until revoked by us jointly in writing.

Edwin J. Bohnen
Witness — Edwin J. Bohnen

Theodore G. Bohnen
Witness — Theodore G. Bohnen

Virginia E. Bohnen
Witness — Virginia E. Bohnen

Signatures OK.
38
38.11.25

Dated November 1938

ATTACH TO APPLICATION
NOV 28 1938

NOTED ON DIVIDEND CARD
NOV 25 1938
38

Draw dividend checks to the order of Virginia E. Bohnen, alone per owners' request dated 38 11

THE EQUITABLE
LIFE ASSURANCE SOCIETY OF THE UNITED STATES

A MUTUAL COMPANY — ORGANIZED JULY 26, 1859

HEREBY INSURES THE LIFE OF

— MARY A. BONNEN —
(HEREIN CALLED THE OWNER)

And agrees to pay

— SEVENTY-TWO THOUSAND — Dollars,
(HEREIN CALLED THE FACE AMOUNT)

to the Special Beneficiaries as named in Special Provision attached hereto, dated October 25, 1935, and in accordance therewith
(herein called the special beneficiary, with the right to the special Owner to change the beneficiary or assign this policy)

upon receipt of due proof of the death of the Insured, provided this policy is then in force and is then surrendered properly released.

This insurance is granted in consideration of the payment to the Society of a single premium of

Fifty-three thousand seven hundred seventeen and 04/100 Dollars.

THE PROVISIONS of the subsequent pages hereof form a part of this contract as fully as if recited at length over the signatures hereto affixed. This policy is executed at the Home Office of the Society in New York on its date of issue, the Twenty-fifth day of October, 19 35.

W. Alexander Secretary. Thomas I. Parkinson President.

Asst Registrar.

No. 2057. 35. 1.
Single Prem. Life.

INSURANCE PAYABLE AT DEATH. SINGLE PREMIUM. ANNUAL DIVIDENDS.

(Entries on this page are to be made only by the Society at its Home Office in New York. No other entries will be recognized.)

OWNER. The rights conferred upon the Owner by the terms of this policy shall be vested in the Insured's children, EDWIN J. BOHMEN, THEODORE G. BOHMEN, and VIRGINIA E. BOHMEN, jointly during their lifetime. Upon the death of any one of the Insured's said children, such rights shall be vested in the survivors of them, jointly during their lifetime, or if only one of them be surviving, such rights shall be vested in the survivor of them during his or her lifetime. Upon the death of the last survivor of the Insured's said children, such rights shall be vested in the executors or administrators of the last survivor of the Insured's said children.

A person while thus vested with the rights of Owner may, prior to the death of the Insured, exercise the rights conferred upon the Owner by the terms of this policy without the consent of the Insured or any special beneficiary.

Asst. Registrar

SPECIAL
CHANGE OF BENEFICIARY REGISTER.

DATE ENDORSED	SPECIAL BENEFICIARY	ENDORSED BY

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

Attached to and made part of Policy No. 9,896,003 *on the life of* --- MARY A. BOHMEN ---, *the Insured.*

SPECIAL PROVISION:

1. It is hereby specially provided that settlement of the amount becoming due by reason of the death of the Insured shall be made with the Insured's children, EDWIN J. BOHMEN, THEODORE G. BOHMEN and VIRGINIA E. BOHMEN, in equal shares, survivors or survivor, as provided in paragraph 2, should none survive, with the children of the Insured's said children, in equal shares, survivors or survivor, as provided in paragraph 3, should none survive, in a single sum with the executors or administrators of the last survivor of the Insured's said children.

2. The share becoming due to each said child of the Insured under paragraph 1 shall be left on deposit with the Society in accordance with Option 1 of the Optional Modes of Settlement during his or her lifetime, interest payable monthly, except that such child shall have the following privilege:

   (a) at any time of having such share then held under said Option 1, together with any interest accrued thereon, paid in accordance with Option 2 of the said Optional Modes of Settlement over a period of not less than TEN YEARS; or

   (b) at any time of having such share then held under said Option 1, together with any interest accrued thereon, paid as a Life Income in accordance with Option 3 of the said Optional Modes of Settlement.

A. Should any of the Insured's said children elect settlement in accordance with said Option 2 or 3 and die, subsequent to the death of the Insured, any instalments of such share under said Option 2, or any CERTAIN instalments of such share under said Option 3, as the case may be, remaining unpaid at his or her death, shall be paid as each instalment shall become due in equal shares to the survivors or survivor of the Insured's said children, should neither survive, to the children of the Insured's said children, in equal shares, survivors or survivor. Any instalments under said Option 2, or any CERTAIN instalments under said Option 3, as the case may be, remaining unpaid at the death of the last survivor of the Insured's said children and the children of the Insured's said children, subsequent to the death of the Insured, shall be commuted and paid in a single sum to such last survivor's executors or administrators.

B. In the event of the death of any of the Insured's said children, subsequent to the death of the Insured, settlement of such share then remaining under said Option 1, together with any interest accrued thereon, shall be made in equal shares, with the survivors or survivor of the Insured's said children as herein provided. Settlement of the amount then remaining under said Option 1, together with any interest accrued thereon, at the death of the last survivor of the Insured's said children, subsequent to the death of the Insured, shall be made with the children of the Insured's said

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THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

Attached to and made part of Policy No. 9,898,003 *on the life of* --- MARY A. BOHNEN ---, *the Insured.*

-2-

children, in equal shares, survivors or survivor, as provided in paragraph 3, should none survive, in a single sum with such last survivor's executors or administrators.

3. The share becoming due to each child of the Insured's said children under paragraph 1 or 2-B shall be left on deposit with the Society in accordance with said Option 1 for a period not to exceed TWENTY-ONE YEARS after the death of the last survivor of the Insured and the Insured's said children, interest payable monthly, except that such child shall have the privilege upon the date on which he or she shall have attained the age of TWENTY-ONE YEARS or on any interest due date thereafter of withdrawing all of the share then held on deposit or any part thereof, but no partial withdrawal, other than a final withdrawal of any balance of the share then remaining on deposit, may be made for less than FIVE HUNDRED DOLLARS. Upon the expiration of the said period of TWENTY-ONE YEARS, such share then held under said Option 1, together with any interest accrued thereon, shall be paid in a single sum to such child.

In the event of the death of any child of the Insured's said children, subsequent to the death of the Insured and the Insured's said children, settlement of such share then remaining under said Option 1, together with any interest accrued thereon, shall be made in equal shares with the survivors or survivor of the children of the Insured's said children as herein provided. Any amount remaining under said Option 1, together with any interest accrued thereon, at the death of the last survivor of the children of the Insured's said children, subsequent to the death of the Insured and the Insured's said children, shall be paid in a single sum to such last survivor's executors or administrators.

New York, October 25, 1935.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

HM

Asst. Secretary

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

Attached to and made part of Policy No. 9,696,003 *at the request of* EDWIN J. BOBBIEN, THEODORE G. BOBBIEN and VIRGINIA E. BOBBIEN, *the Owner.*

OPTIONAL MODES OF SETTLEMENT.

The Owner may elect (with the right to revoke or to change such election before the maturity of said policy) to have the net sum becoming due to any special beneficiary under said policy applied under one, or subject to the Society's approval more than one, of the following optional modes of settlement in lieu of a single sum settlement. In the absence of such an election by the Owner, the special beneficiary, after such net sum becomes due, may so elect. The special beneficiary, after such net sum becomes due, may designate (with the right to change such designation) a person or persons to receive any amount which in the absence of such a designation would become payable to the special beneficiary's executors or administrators. Such election, revocation, designation or request for change shall be in writing and shall not take effect until filed with the Society at its Home Office and endorsed upon the policy or the supplementary contract, if any.

1. DEPOSIT OPTION: Left on deposit with the Society at interest guaranteed at the rate of 3½ per annum, with such Excess Interest Dividend as may be apportioned.
2. INSTALMENT OPTION: FIXED PERIOD. Paid in a fixed number of equal annual, semi-annual, quarterly or monthly instalments as set forth in the table on the back hereof.
3. LIFE INCOME OPTION: Paid in equal annual, semi-annual, quarterly or monthly instalments as set forth in the table on the back hereof for life, ten or twenty years certain as may be elected and continuing during the remaining lifetime of the person upon whose life the Income depends. The amount of each instalment shall be based on such person's sex and age at birthday nearest the due date of the first instalment.
4. INSTALMENT OPTION: FIXED AMOUNT. Paid in equal annual, semi-annual, quarterly or monthly instalments of such amount as may be agreed upon until the net sum due under said policy together with interest on the unpaid balance at the rate of 3½ per annum, and such Excess Interest Dividends as may be apportioned, shall be exhausted, the final payment to be for the balance then remaining with the Society. If the interest and Excess Interest Dividend for any year shall be in excess of the instalments payable in such year, then the total amount of the instalments for the subsequent year shall be increased by the amount of such excess.

EXCESS INTEREST DIVIDENDS: The foregoing Options are based upon an interest earning of 3½ per annum; but if in any year the Society declares that funds held under such Options shall receive interest in excess of 3½ per annum, the interest under Option 1, the amount of instalment under Option 2, the amount of income during the fixed period of five, ten or twenty years under Option 3 and the funds held under Option 4, shall be increased for that year by an Excess Interest Dividend at Accumulated and apportioned by the Society.

The foregoing optional modes of settlement may not be elected if at the time of such election the amount to be applied under said policy and under any other policy or policies of this Society on the life of the Insured and payable in the same manner and to the same person, shall in the aggregate be less than $1000. If the fractional year's instalments or interest payments to any payee would amount to less than $10 each, the Society reserves the right to pay at such intervals as will make the payments amount to at least $10 each.

No option of settlement elected by the Owner hereunder can be changed nor can any payment thereunder be commuted, except by the Owner's written order filed with the Society at its Home Office before the maturity of said policy. The right of commutation under Option 3 shall in any event extend only to the instalments for the period certain. The Society reserves the right to defer the payment of any amount which after being applied under these optional modes of settlement is withdrawn upon subsequent election, for a period not exceeding six months after receipt of application therefor.

Under Options 2, 3 and 4, the first instalment will be due upon the date as of which the Option becomes operative.

If Option 3 be elected the Society will require satisfactory evidence of the age of the person upon whose life the Income depends. After the expiration of the period certain, instalments under Option 3 will continue during the lifetime of such person, terminating with the last instalment due prior to the death of such person.

The Society will make each payment under the above Options by check which will require the personal endorsement of the payee as proof of survival. If any payment depends upon the survival of any person other than the payee, evidence satisfactory to the Society of the survival of such person on the due date of such payment must be furnished.

None of the Options shall be available to an assignee. The Options shall be available only if there is a personal special beneficiary, i.e., other than a corporation, firm, trustee, etc.

New York, October 25, 1935

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

W. Alexander, Secretary. Thomas I. Parkinson, President.

TABLE OF INSTALMENTS UNDER OPTIONAL MODES OF SETTLEMENT FOR EACH $1,000 OF PROCEEDS.

The semi-annual and quarterly instalments are 50.37% and 25.28% respectively of the annual instalment under Option 2, and not less than these respective percentages under Option 3.

OPTION 2

Number of Years of Instalments	Monthly Instalment	Annual Instalment	Number of Years of Instalments	Monthly Instalment	Annual Instalment	Number of Years of Instalments	Monthly Instalment	Annual Instalment	Number of Years of Instalments	Monthly Instalment	Annual Instalment	Number of Years of Instalments	Monthly Instalment	Annual Instalment
2	$42.86	$507.39	8	$11.66	$138.30	14	$7.26	$85.94	20	$5.51	$65.25	26	$4.59	$54.30
3	28.09	343.23	9	10.33	124.69	15	6.87	81.32	21	5.32	63.08	27	4.47	53.07
4	22.06	261.19	10	9.31	113.51	16	6.53	77.26	22	5.15	60.91	28	4.37	51.74
5	17.91	211.99	11	8.49	104.92	17	6.23	73.74	23	4.99	59.04	29	4.27	50.59
6	15.14	179.22	12	8.24	97.53	18	5.96	70.59	24	4.84	57.32	30	4.18	49.53
7	13.16	155.83	13	7.71	91.29	19	5.73	67.78	25	4.71	55.78			

OPTION 3—LIFE INCOME

Age of Person upon Whose Life the Income Depends		5 Years Certain		10 Years Certain		20 Years Certain		Age of Person upon Whose Life the Income Depends		5 Years Certain		10 Years Certain		20 Years Certain	
MALE	FEMALE	Monthly Instalment	Annual Instalment	Monthly Instalment	Annual Instalment	Monthly Instalment	Annual Instalment	MALE	FEMALE	Monthly Instalment	Annual Instalment	Monthly Instalment	Annual Instalment	Monthly Instalment	Annual Instalment
..	10	$3.15	$37.21	$3.14	$37.10	$3.11	$36.72	46	50	$4.02	$47.54	$4.02	$46.68	$4.47	$52.58
..	11	3.17	37.38	3.16	37.28	3.13	36.90	47	51	3.93	46.68	4.01	47.36	4.42	52.23
..	12	3.19	37.58	3.18	37.48	3.14	37.09	48	52	3.83	45.69	4.01	46.62	4.34	51.69
..	13	3.21	37.80	3.20	37.70	3.16	37.20	49	53	3.73	44.68	3.99	46.37	4.24	51.03
10	14	3.23	38.05	3.22	37.94	3.18	37.32	50	54	3.64	43.68	3.97	46.07	4.09	50.19
11	15	3.25	38.31	3.24	38.20	3.20	37.76	51	55	3.46	43.71	3.90	45.97	4.75	55.85
12	16	3.27	38.59	3.26	38.47	3.22	38.00	52	56	3.52	42.13	3.41	43.30	4.60	54.50
13	17	3.30	38.88	3.29	38.74	3.24	38.25	53	57	3.72	44.63	3.82	44.89	4.44	52.15
14	18	3.32	39.15	3.31	39.02	3.26	38.50	54	58	3.92	46.19	3.84	45.98	4.31	50.78
15	19	3.35	39.43	3.33	39.28	3.29	38.78	55	59	4.00	48.04	3.76	47.31	4.24	49.41
16	20	3.37	39.71	3.36	39.56	3.31	39.01	56	60	4.15	71.87	5.88	69.74	5.01	59.03
17	21	3.40	40.01	3.38	39.86	3.33	39.26	57	61	6.31	73.38	6.01	70.22	5.08	59.61
18	22	3.42	40.32	3.41	40.16	3.35	39.50	58	62	6.48	75.28	6.14	71.75	5.11	60.13
19	23	3.45	40.64	3.43	40.48	3.38	39.85	59	63	6.65	77.28	6.28	73.32	5.15	60.72
20	24	3.48	40.98	3.46	40.80	3.41	40.15	60	64	6.84	79.38	6.42	74.84	5.19	61.34
21	25	3.51	41.32	3.49	41.15	3.43	40.46	61	65	7.03	81.58	6.56	76.39	5.23	61.73
22	26	3.54	41.69	3.52	41.50	3.46	40.79	62	66	7.24	83.88	6.71	78.02	5.27	62.18
23	27	3.57	42.07	3.56	41.88	3.49	41.12	63	67	7.45	86.30	6.85	79.62	5.31	62.72
24	28	3.61	42.47	3.59	42.26	3.52	41.47	64	68	7.67	88.83	7.01	81.78	5.34	63.08
25	29	3.64	42.86	3.62	42.67	3.55	41.83	65	69	7.91	91.48	7.15	83.57	5.38	63.58
26	30	3.68	43.31	3.66	43.09	3.58	42.20	66	70	8.15	94.22	7.31	85.38	5.39	63.68
27	31	3.72	43.78	3.70	43.52	3.61	42.59	67	71	8.41	97.13	7.47	87.19	5.41	63.94
28	32	3.76	44.23	3.74	43.98	3.65	42.98	68	72	8.68	100.17	7.62	89.01	5.43	64.19
29	33	3.80	44.72	3.78	44.46	3.68	43.40	69	73	8.95	103.33	7.77	90.83	5.43	64.40
30	34	3.85	45.24	3.82	44.96	3.72	43.82	70	74	9.24	106.61	7.90	92.63	5.44	64.56
31	35	3.89	45.77	3.87	45.47	3.76	44.26	71	75	9.55	110.03	8.07	94.41	5.47	64.72
32	36	3.94	46.32	3.91	46.01	3.80	44.72	72	76	9.88	113.59	8.22	96.13	5.48	64.88
33	37	3.99	46.91	3.96	46.59	3.84	45.19	73	77	10.16	117.23	8.36	97.84	5.49	64.96
34	38	4.05	47.53	4.01	47.16	3.89	45.67	74	78	10.52	121.03	8.49	99.43	5.50	65.04
35	39	4.10	48.17	4.07	47.78	3.92	46.17	75	79	10.86	124.99	8.62	101.03	5.50	65.10
36	40	4.16	48.84	4.12	48.43	3.97	46.69	76	80	11.21	129.04	8.75	102.54	5.50	65.10
37	41	4.22	49.54	4.18	49.08	4.01	47.22	77	81	11.57	133.04	8.88	103.98	5.50	65.10
38	42	4.29	50.27	4.24	49.78	4.05	47.76	78	82	11.94	137.26	8.98	105.27	5.50	65.10
39	43	4.35	51.04	4.30	50.51	4.11	48.33	79	83	12.31	141.63	9.05	105.48	5.50	65.10
40	44	4.42	51.84	4.37	51.26	4.16	48.89	80	84	12.68	145.86	9.15	107.80	5.50	65.10
41	45	4.50	52.69	4.44	52.05	4.21	49.48	81	85	13.05	150.23	9.23	108.80	5.50	65.10
42	46	4.57	53.57	4.51	52.88	4.26	50.07	82	..	13.43	154.61	9.30	109.59	5.50	65.10
43	47	4.65	54.49	4.58	53.74	4.31	50.68	83	..	13.80	158.97	9.36	110.29	5.50	65.10
44	48	4.74	55.46	4.66	54.64	4.36	51.31	84	..	14.17	163.31	9.41	110.97	5.50	65.10
45	49	4.83	56.48	4.74	55.57	4.42	51.94	85 and over	..	14.52	167.57	9.45	111.56	5.50	65.10

INCONTESTABILITY AND FREEDOM OF TRAVEL, RESIDENCE AND OCCUPATION.

This policy shall be (a) INCONTESTABLE after it has been in force during the lifetime of the Insured for a period of two years from its date of issue, and (b) FREE FROM RESTRICTIONS on travel, residence, occupation or military or naval service.

PARTICIPATION IN DIVIDENDS.

The proportion of divisible surplus accruing upon this policy shall be ascertained annually. At the end of the first and each subsequent policy year any surplus apportioned by the Society to this policy as a Dividend shall, at the option of the Owner, be:

1. Paid in cash; or
2. Applied to the purchase of paid-up additional insurance (herein called Dividend Additions), and the Owner may at any time surrender such Dividend Additions and subject to the provision entitled "Deferment" on the fifth page hereof receive the cash value thereof which shall not be less than the original cash Dividend; or
3. Left to accumulate at 3% interest, compounded annually, and if in any year the Society declares that funds held under this Option shall receive interest in excess of 3% per annum the accumulation hereunder shall be increased by an Excess Interest Dividend in an amount to be determined and apportioned by the Society. Any accumulations under this Option (herein called Dividend Accumulations) will be payable to the Owner on demand on any anniversary of the Register date of this policy.

If the Owner does not elect one of the foregoing Options within three months after the mailing by the Society of a notice requiring such election, the Dividend shall be applied as provided under Option 2. If the Insured dies after the first policy year and while this policy is in force, such cash dividend as may be apportioned by the Society for the fraction of the then current policy year elapsed before such death will be allowed.

Any Dividend and any Dividend Additions or Dividend Accumulations remaining unpaid at the maturity of this policy shall be payable together with the face amount hereof to the same person or persons and in the same manner as the face amount hereof unless otherwise provided herein.

PAYMENT AS MATURED ENDOWMENT. Whenever during the lifetime of the Insured the reserve on this policy and on any Dividend Additions together with any Dividend Accumulations hereunder equals or exceeds the face amount hereof, the Society, upon surrender of this policy with due release, will regard this policy as a matured Endowment and will pay to the Owner the face amount of insurance hereunder less any indebtedness, together with any Dividend or Dividend Accumulations and the cash value of any Dividend Additions not required to provide such face amount.

RE-ISSUE TO INSURED. Upon the written request of the Insured, accompanied by this policy and an assignment satisfactory to the Society of all rights and interests hereunder to the Insured, this policy if in force will be rewritten (without medical re-examination) in favor of the Insured on a policy form issued by the Society at the Register date hereof for the same plan of insurance as that upon which this policy is written. The new policy will be effective as of the Register date of this policy and will be subject to any indebtedness to the Society existing against this policy.

Asst. Registrar.

ASSIGNMENTS. No assignment of this policy shall be binding upon the Society or be deemed to be in force unless in writing and until filed at its Home Office. The Society assumes no responsibility for the validity of any assignment.

~~**BENEFICIARY.** If there is no written assignment of this policy in force and on file with the Society or if the only assignment in force and on file is to the Society as security for an advance, the Insured may from time to time, by written notice duly filed at the Society's Home Office, change the beneficiary, but such change shall take effect only upon its endorsement on this policy by the Society.~~

If the executors or administrators of the Insured be not expressly designated as beneficiary, any part of the proceeds of this policy with respect to which there is no designated beneficiary living at the death of the Insured and no assignee entitled thereto, will be payable in a single sum to the children of the Insured who survive the Insured, in equal shares, or should none survive, then to the Insured's executors or administrators.

The Insured (or assignee if any) may, without the consent of the beneficiary, surrender, assign or pledge this policy and all rights hereunder or subject to the Society's approval, change to another form or plan of insurance. An assignment by the Insured shall operate to exclude any and all rights of any beneficiary under this policy except that upon release of all outstanding assignments or upon reassignment to the Insured all rights under this policy shall be the same as if such assignments of said policy had not been made and that if assigned or pledged as collateral only by the Insured any equity remaining at the death of the Insured shall accrue to the beneficiary ~~Insured before issue of contract~~

POLICY YEARS. The first policy year under this policy shall begin on the Register date stated on the back of this policy and the second and subsequent policy years shall begin on the respective anniversaries of the Register date.

AGE. If the age of the Insured has been misstated, any benefits accruing under this policy shall be adjusted to correspond to those which would accrue under a similar policy which the premium paid would have purchased at the Society's rates in use at the Register date hereof for the Insured's correct age. The Society will, however, admit the age of the Insured if furnished with proof thereof satisfactory to the Society, and in that event will issue to the Owner without cost a certificate evidencing such admission.

THE CONTRACT. This policy, and the application therefor, a copy of which is endorsed hereon or securely attached hereto, constitute the entire contract between the parties. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall avoid this policy or be used in defense of a claim hereunder unless contained in the written application therefor and a copy of such application is endorsed hereon or attached hereto, when issued.

All sums payable by the Society under this policy shall be payable at its Home Office in the City of New York.

SELF-DESTRUCTION. Self-destruction sane or insane, within two years from the date of issue hereof, is a risk not assumed by the Society under this policy. In such an event the Society's liability shall be limited to the payment to the person entitled to receive the first payment on account of the proceeds of this policy of a single sum equal to the premium actually paid under this policy.

SPECIAL BENEFICIARY. If there is no written assignment of this policy in force and on file with the Society or if the only assignment in force and on file is to the Society as security for an advance, the Owner may while this policy is in force designate a special beneficiary or beneficiaries who shall be entitled to receive the net sum due upon the death of the Insured and may from time to time prior to the death of the Insured change such beneficiary or beneficiaries. Such designation or change of special beneficiary shall be made by written notice duly filed at the Society's Home Office, but shall take effect only upon its endorsement on this policy by the Society.

Prior to the death of the Insured, the Owner (or assignee if any) may surrender, assign or pledge this policy and all rights hereunder or, subject to the Society's approval, change to another form or plan of insurance. An assignment by the Owner shall operate to exclude any and all rights of any such special beneficiary under this policy or any other person referred to therein except that upon release of all outstanding assignments or upon reassignment to the Owner all rights under this policy shall be the same as if such assignments of said policy had not been made and that if assigned or pledged as collateral only by the Owner any equity remaining at the death of the Insured shall accrue to such special beneficiary.

PROVISIONS RELATING TO LOANS AND SURRENDER VALUES.

LOANS. The Society, at any time while this policy is in force, will advance to the Owner on proper assignment of this policy and on the sole security hereof, at 6% interest per annum payable annually on the anniversary of the Register date a sum not exceeding the cash value, at the end of the current policy year, of this policy (as shown in the following table) and of any Dividend Additions. The Society shall deduct from such advance interest thereon to the end of the current policy year and any existing indebtedness (including interest) to the Society against this policy. The payment of the proceeds of any advance shall be subject to the provision entitled "Deferment" set forth below. Interest if not paid when due shall be added to the existing loan and bear interest at the same rate. Failure to repay any advance or to pay interest thereon shall not avoid this policy unless the total indebtedness hereon shall equal or exceed the total loan value as defined in the following table, nor until thirty-one days after notice shall have been mailed to the Owner and to the assignee of record, if any, at their addresses last known to the Society.

Such advance may be repaid at any time while this policy is in force.

CASH SURRENDER VALUE. This policy, after being in force for one year, may be surrendered by the Owner within three months after any anniversary of the Register date hereof for its net cash value, which shall be the cash value as determined in accordance with the opposite table increased by the cash value of any Dividend Additions and reduced by the amount of any indebtedness (including interest) to the Society against this policy.

The payment of any cash value due under this policy shall be subject to the provision entitled "Deferment" set forth below.

BASIS OF COMPUTATION. The Reserve for which funds are to be held for the face amount of this policy shall be computed upon the American Experience Table of Mortality with interest at 3½.

The cash values shown in the opposite table are equal to the said Reserves at the end of the respective policy years stated, less a surrender charge of not more than 5% of the face amount at the end of the first policy year, of not more than 3½% of the face amount at the end of the second policy year and of not more than 2½% of the face amount from the end of the third policy year until the completion of the twentieth policy year, at which time and thereafter there is no deduction made as a surrender charge except that fractions of a dollar are not allowed.

DEFERMENT. The payment of any cash value due under this policy or the payment of the proceeds of any advance, if for a purpose other than to pay premiums on policies in the Society, may be deferred by the Society for a period not exceeding six months after receipt of application therefor.

TABLE OF LOAN AND SURRENDER VALUES
APPLICABLE WHEN THERE ARE NO DIVIDEND ADDITIONS AND NO INDEBTEDNESS AGAINST THIS POLICY.

After policy has been in force YEARS	Cash Value for Each $1000 of Face Amount.	After policy has been in force YEARS	Cash Value for Each $1000 of Face Amount.
1	$658	14	$810
2	$678	15	$818
3	$699	16	$827
4	$710	17	$836
5	$721	18	$861
6	$731	19	$868
7	$742	20	$885
8	$752	21	$893
9	$762	22	$901
10	$772	23	$909
11	$782	24	$917
12	$791	25	$924
13	$800	30	$957

The loan value is the sum which with interest to the end of the current policy year equals the cash value at the end of such year as shown in this table and of any Dividend Additions hereto.

Loan and surrender values for any years not shown in the table will be on the same basis and will be furnished on request.

S.P. LIFE

AGE 62

A16

OPTIONAL MODES OF SETTLEMENT.

The Insured may elect (with the right to revoke or to change such election before the maturity of this policy) to have the net sum due under this policy upon its maturity applied under one, or subject to the Society's approval more than one, of the following optional modes of settlement in lieu of a single sum settlement. In the absence of such an election by the Insured, the beneficiary, after the Insured's death, may so elect. The beneficiary, after the Insured's death, may designate (with the right to change such designation) a person or persons to receive any amount which in the absence of such a designation would become payable to the beneficiary's executors or administrators. Such election, revocation, designation or request for change shall be in writing and shall not take effect until filed with the Society at its Home Office and endorsed upon the policy or the supplementary contract, if any.

1. DEPOSIT OPTION: Left on deposit with the Society at interest guaranteed at the rate of 3% per annum, with such Excess Interest Dividend as may be apportioned.

2. INSTALMENT OPTION: FIXED PERIOD. Paid in a fixed number of equal annual, semi-annual, quarterly or monthly instalments as set forth in the table on the following page.

3. LIFE INCOME OPTION: Paid in equal annual, semi-annual, quarterly or monthly instalments as set forth in the table on the following page for five, ten or twenty years certain as may be elected and continuing during the remaining lifetime of the person upon whose life the income depends. The amount of such instalments shall be based on such person's sex and age at birthday nearest the due date of the first instalment.

4. INSTALMENT OPTION: FIXED AMOUNT. Paid in equal annual, semi-annual, quarterly or monthly instalments of such amount as may be agreed upon until the net sum due under this policy together with interest on the unpaid balances at the rate of 3% per annum, and such Excess Interest Dividends as may be apportioned, shall be exhausted, the final payment to be the balance then remaining with the Society. If the interest and Excess Interest Dividend for any year shall be in excess of the instalments payable in such year, then the total amount of the instalments for the subsequent year shall be increased by the amount of such excess.

EXCESS INTEREST DIVIDEND: The foregoing Options are based upon an interest earning of 3% per annum; but if in any year the Society declares that funds held under such Options shall receive interest in excess of 3% per annum, the interest under Option 1, the amount of instalment under Option 2, the amount of income during the fixed period of five, ten or twenty years under Option 3 and the funds held under Option 4, shall be increased for that year by an Excess Interest Dividend as determined and apportioned by the Society.

OPTIONAL MODES OF SETTLEMENT FOR CASH VALUE. If this policy be surrendered by the Insured for its cash value on or after the fifth anniversary of the Register date of this policy, the Insured, by written notice filed with the Society at its Home Office at the time of such surrender, may elect to have the cash value of this policy, together with any unpaid Dividend or Dividend Accumulations and the cash value of any Dividend Additions hereunder, less any indebtedness (including interest) to the Society against this policy, applied under one of the foregoing optional modes of settlement, but for the benefit of the Insured in lieu of the beneficiary. A supplementary contract evidencing such election will then be issued by the Society.

If any of said Options be elected, the Insured may nominate the person who shall receive any amount remaining unpaid at the death of the Insured, and, if there be no written assignment of the supplementary contract in force and on file with the Society, the Insured may change the nominee. If Option 1 be elected, the Insured may also elect to have any amount due under the supplementary contract at his death applied under one, or subject to the Society's approval more than one, of said Options, but for the benefit of the nominee in lieu of the beneficiary under this policy, and, provided there is no written assignment of the supplementary contract in force and on file with the Society, the Insured may change the mode of settlement so elected to any of said Options. The Insured's nominee, after the Insured's death, may designate (with the right to change such designation) a person or persons to receive any amount which in the absence of such a designation would become payable to the nominee's executors or administrators.

All nominations, designations or requests for change shall be in writing and shall not take effect until filed with the Society at its Home Office and endorsed by the Society upon the supplementary contract.

GENERAL PROVISIONS RELATING TO OPTIONAL MODES OF SETTLEMENT.

The foregoing optional modes of settlement may not be elected if at the time of such election the amount to be applied under this policy and under any other policy or policies of this Society on the life of the Insured and payable in the same manner and to the same person, shall in the aggregate be less than $1000. If the fractional year's instalments or interest payments to any payee would amount to less than $10 each, the Society reserves the right to pay at such intervals as will make the payments amount to at least $10 each.

No option of settlement elected by the Insured hereunder can be changed nor can any payment thereunder be commuted, except by the Insured's written order filed with the Society at its Home Office. If the cash value of this policy is applied under these optional modes of settlement in accordance with the foregoing provisions, the Insured may surrender the supplementary contract on or within 30 days after any interest payment due date under Option 1 or any instalment due date under Option 2, 3 or 4 for the surrender value thereof, which, computed as of such due date, shall be the amount on deposit under Option 1, the commuted value of the instalments certain (on the basis of 3% per annum compound interest) under Options 2 and 3 and the balance then remaining with the Society under Option 4. The Society reserves the right to defer the payment of any amount which after being applied under these optional modes of settlement is withdrawn upon subsequent election, for a period not exceeding six months after receipt of application therefor.

Under Options 2, 3 and 4, the first instalment will be due upon the date as of which the Option becomes operative.

If Option 3 be elected the Society will require satisfactory evidence of the age of the person upon whose life the Income depends. After the expiration of the period certain, instalments under Option 3 will continue during the lifetime of such person, terminating with the last instalment due prior to the death of such person.

The Society will make each payment under the above Options by check which will require the personal endorsement of the payee as proof of survival. If any payment depends upon the survival of any person other than the payee, evidence satisfactory to the Society of the survival of such person on the due date of such payment must be furnished.

None of the Options shall be available to an assignee. The Options shall be available only if there is a personal beneficiary, i.e., other than a corporation, firm, trustee, etc.

COPY

2,000,000

CORPORATE AND ABSOLUTE OWNER APPLICATION, PART I

TO THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

Application is hereby made for a policy for $ 75,000 with all rights vested in the Owners as named in the Special Instructions attached hereto, bearing even date of this application and in accordance therewith.

(Print) full name of Owner. If a corporation, give name of State where organized.

The policy to be on the Single Prem. Ord.Life plan, with premiums of $ 55,717.04 payable a single sum annually in advance, and with DOUBLE ACCIDENT [ ] DISABILITY BENEFIT [ ] or SPECIAL PREMIUM WAIVER [ ]

Insert "Ord. Life," "Life—5 P.," "—year End't," "Convertible," or "—year Term." Insert "annual" or "quarterly"—if necessary. Place (X) mark after benefits selected.

on the life of MARY A. BOHMEN

Insert (print) full name of person to be insured.

Who was born at Chgo.Ills. Place. County. State.

on the 14th of June, 1873, and whose insurance age at nearest birthday is therefore 58 years. Be sure to ascertain correct date of birth (day, month, year) and state correctly the age at nearest birthday.

Whose principal occupation is that of } Housewife. State nature of business in detail, firm name, and if employed, name and address of employer.

Whose other occupations are

Whose residence is No. 6817 Kenneth Ave. Chgo. Cook Ills. Street. City or Town. County. State.

Whose place of business is No. Street. City of Town. County. State.

Any Premium Notices required by law to be sent to Owner at Street. City or Town. County. State.

The Owner has a pecuniary insurable interest in the continuance of the life of the person proposed for insurance arising out of his relationship as

It is hereby agreed that any policy issued hereon shall not take effect until the first premium thereunder has been paid during the good health of the person whose life is to be insured; that no agent or other person except the President, a Vice-President, the Secretary, the Treasurer or a Registrar of the Society has power to make or modify any contract on behalf of the Society or to waive any of the Society's rights or requirements, and that no waiver shall be valid unless in writing and signed by one of the foregoing officers. All of the foregoing answers and all those contained in part II hereof are true, and are offered to the Society as an inducement to issue the policy or policies for which application is hereby made.

The foregoing application is made at our instance and request and the statements therein contained are correct.

ENTER HERE ANY SPECIAL INSTRUCTIONS: the Beneficiaries as named in Special Provision attached hereto, bearing date of this application and in accordance therewith.

Attach rider P.P. 1246.

Signature of Owner. (SGD) EDWIN J. BOHMEN.

By THEODORE G. BOHMEN

VIRGINIA E. BOHMEN

Dated at Chgo.Ills.Oct.16 19 28

I hereby apply for and consent to the insurance herein specified and certify that all the representations and statements made herein are true. Send any premium notices required by law to the Owner herein named.

(SGD) MARY A. BOHMEN

Signature of person to be insured.

Soliciting Agent only should sign here. (If two or more persons jointly assigned to solicit this application, each should sign his full name and designate his position. Initials of above are not signed. All firm names must be signed as they are.)

O-120949

AGENCY or AGENCIES.

P.P.220 C.X. 31.3. Corp. & Abs. Owner.

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ATTACHED TO AND MADE PART OF CORPORATE AND ABSOLUTE OWNER APPLICATION, PART 1, BEARING SAME DATE.

SPECIAL PROVISIONS:

1. It is hereby specially provided that settlement of the amount becoming due by reason of the death of the Insured shall be made with the Insured's children, EDWIN J. BOSHEN, THEODORE G. BOSHEN and VIRGINIA P. BOSHEN, in equal shares, survivors or survivor, as provided in paragraph 2, should none survive, with the children of the Insured's said children, in equal shares, survivors or survivor, as provided in paragraph 3, should none survive, in a single sum with the executors or administrators of the last survivor of the Insured's said children.

2. The share becoming due to each said child of the Insured under paragraph 1 shall be left on deposit with the Society in accordance with Option 1 of the Optional Modes of Settlement during his or her lifetime, interest payable monthly, except that such child shall have the following privilege:

   (a) at any time of having such share then held under said Option 1, together with any interest accrued thereon, paid in accordance with Option 2 of the said Optional Modes of Settlement over a period of not less than TEN YEARS; or

   (b) at any time of having such share then held under said Option 1, together with any interest accrued thereon, paid as a Life Income in accordance with Option 3 of the said Optional Modes of Settlement.

3. Should any of the Insured's said children elect settlement in accordance with said Option 2 or 3 and die, subsequent to the death of the Insured, any instalments of such share under said Option 2, or any CERTAIN instalments of such share under said Option 3, as the case may be, remaining unpaid at his or her death, shall be paid as each instalment shall become due in equal shares to the survivors or survivor of the Insured's said children, should neither survive, to the children of the Insured's said children, in equal shares, survivors or survivor. Any instalments under said Option 2, or any CERTAIN instalments under said Option 3, as the case may be, remaining unpaid at the death of the last survivor of the Insured's said children and the children of the Insured's said children, subsequent to the death of the Insured, shall be commuted and paid in a single sum to such last survivor's executors or administrators.

4. In the event of the death of any of the Insured's said children, subsequent to the death of the Insured, settlement of such share then remaining under said Option 1, together with any interest accrued thereon, shall be made in equal shares, with the survivors or survivor of the Insured's said children as herein provided. Settlement of the amount then remaining under said Option 1, together with any interest accrued thereon, at the death of the last survivor of the Insured's said children, subsequent to the death of the Insured, shall be made with the children of the Insured's said

- continued -

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-2-

children, in equal shares, survivors or survivor, as provided in paragraph 3, should none survive, in a single sum with such last survivor's executors or administrators.

4. The share becoming due to each child of the Insured's said children under paragraph 1 or 2 shall be left on deposit with the Society in accordance with said Option 1 for a period not to exceed TWENTY-ONE YEARS after the death of the last survivor of the Insured and the Insured's said children, interest payable monthly, except that such child shall have the privilege upon the date on which he or she shall have attained the age of TWENTY-ONE YEARS or on any interest due date thereafter of withdrawing all of the share then held on deposit or any part thereof, but no partial withdrawal, other than a final withdrawal of any balance of the share then remaining on deposit, may be made for less than FIVE HUNDRED DOLLARS. Upon the expiration of the said period of TWENTY-ONE YEARS, such share then held under said Option 1, together with any interest accrued thereon, shall be paid in a single sum to such child.
In the event of the death of any child of the Insured's said children, subsequent to the death of the Insured and the Insured's said children, settlement of such share then remaining under said Option 1, together with any interest accrued thereon, shall be made in equal shares with the survivors or survivor of the children of the Insured's said children as herein provided. Any amount remaining under said Option 1, together with any interest accrued thereon, at the death of the last survivor of the children of the Insured's said children, subsequent to the death of the Insured and the Insured's said children, shall be paid in a single sum to such last survivor's executors or administrators.

October 14, 1935.

ATTACHED TO AND MADE PART OF CORPORATE AND ABSOLUTE OWNER APPLICATION, PART 1, BEARING SAME DATE.

SPECIAL INSTRUCTIONS:
The rights conferred upon the Owner by the terms of this policy shall be vested in the Insured's children, EDWIN J. BOHMEN, THEODORE G. BOHMEN, and VIRGINIA E. BOHMEN, jointly during their lifetime. Upon the death of any one of the Insured's said children, such rights shall be vested in the survivors of them, jointly during their lifetime, or if only one of them be surviving, such rights shall be vested in the survivor of them during his or her lifetime. Upon the death of the last survivor of the Insured's said children, such rights shall be vested in the executors or administrators of the last survivor of the Insured's said children.

Dated October 14, 1935.

TABLE OF INSTALMENTS UNDER OPTIONAL MODES OF SETTLEMENT FOR EACH $1,000 OF PROCEEDS.

The semi-annual and quarterly instalments are 50.37% and 25.28% respectively of the annual instalment under Option 2, and are less than these respective percentages under Option 3.

OPTION 2

Number of Years' Instalments	Monthly Instalment	Annual Instalment	Number of Years' Instalments	Monthly Instalment	Annual Instalment	Number of Years' Instalments	Monthly Instalment	Annual Instalment	Number of Years' Instalments	Monthly Instalment	Annual Instalment	Number of Years' Instalments	Monthly Instalment	Annual Instalment
1	$42.86	$507.39	8	$11.68	$138.30	14	$7.26	$85.94	20	$5.51	$65.25	26	$4.59	$54.30
2	21.99	343.23	9	10.53	124.69	15	6.87	81.32	21	5.32	62.98	27	4.47	52.97
3	22.06	261.19	10	9.61	113.81	16	6.53	77.29	22	5.15	60.91	28	4.37	51.74
4	17.91	211.99	11	8.86	104.92	17	6.23	73.74	23	4.99	59.04	29	4.27	50.59
5	15.14	179.22	12	8.24	97.53	18	5.96	70.59	24	4.84	57.32	30	4.18	49.53
6	13.16	155.83	13	7.71	91.29	19	5.73	67.78	25	4.71	55.75			

OPTION 3—LIFE INCOME

Age of Person upon Whose Life the Income Depends		5 Years Certain		10 Years Certain		20 Years Certain		Age of Person upon Whose Life the Income Depends		5 Years Certain		10 Years Certain		20 Years Certain	
MALE	FEMALE	Monthly Instalment	Annual Instalment	Monthly Instalment	Annual Instalment	Monthly Instalment	Annual Instalment	MALE	FEMALE	Monthly Instalment	Annual Instalment	Monthly Instalment	Annual Instalment	Monthly Instalment	Annual Instalment
..	10 and under	$3.15	$37.21	$3.14	$37.10	$3.11	$36.72	46	50	$4.92	$57.54	$4.83	$56.55	$4.47	$52.58
..	11	3.17	37.38	3.16	37.28	3.13	36.90	47	51	5.02	58.66	4.91	57.56	4.52	53.23
..	12	3.19	37.58	3.18	37.48	3.14	37.09	48	52	5.12	59.83	5.01	58.62	4.58	53.88
..	13	3.21	37.80	3.20	37.70	3.16	37.30	49	53	5.23	61.06	5.10	59.72	4.64	54.52
10 and under	14	3.23	38.05	3.22	37.94	3.18	37.52	50	54	5.34	62.35	5.20	60.87	4.69	55.19
11	15	3.25	38.31	3.24	38.20	3.20	37.76	51	55	5.46	63.71	5.30	62.07	4.75	55.86
12	16	3.27	38.59	3.26	38.47	3.22	38.00	52	56	5.58	65.13	5.41	63.30	4.80	56.50
13	17	3.30	38.88	3.29	38.74	3.24	38.25	53	57	5.72	66.62	5.52	64.59	4.86	57.15
14	18	3.32	39.15	3.31	39.02	3.26	38.50	54	58	5.85	68.19	5.64	65.93	4.91	57.78
15	19	3.35	39.43	3.33	39.28	3.29	38.75	55	59	6.00	69.84	5.76	67.31	4.96	58.41
16	20	3.37	39.71	3.36	39.56	3.31	39.01	56	60	6.15	71.57	5.88	68.74	5.01	59.02
17	21	3.40	40.01	3.38	39.86	3.33	39.28	57	61	6.31	73.38	6.01	70.22	5.06	59.61
18	22	3.42	40.32	3.41	40.16	3.35	39.56	58	62	6.48	75.28	6.14	71.75	5.11	60.18
19	23	3.45	40.64	3.43	40.48	3.38	39.85	59	63	6.65	77.28	6.28	73.32	5.15	60.72
20	24	3.48	40.98	3.46	40.80	3.41	40.15	60	64	6.84	79.38	6.42	74.94	5.19	61.24
21	25	3.51	41.32	3.49	41.15	3.43	40.46	61	65	7.03	81.58	6.56	76.59	5.23	61.73
22	26	3.54	41.69	3.52	41.50	3.46	40.79	62	66	7.24	83.88	6.71	78.29	5.27	62.18
23	27	3.57	42.07	3.56	41.88	3.49	41.12	63	67	7.45	86.30	6.86	80.02	5.31	62.61
24	28	3.61	42.47	3.59	42.26	3.52	41.47	64	68	7.67	88.83	7.01	81.78	5.34	62.99
25	29	3.64	42.88	3.62	42.67	3.55	41.83	65	69	7.91	91.48	7.16	83.57	5.36	63.35
26	30	3.68	43.31	3.66	43.09	3.58	42.20	66	70	8.15	94.25	7.31	85.38	5.39	63.66
27	31	3.72	43.76	3.70	43.52	3.61	42.58	67	71	8.41	97.13	7.47	87.19	5.41	63.94
28	32	3.76	44.23	3.74	43.98	3.65	42.98	68	72	8.68	100.17	7.62	89.01	5.43	64.19
29	33	3.80	44.72	3.78	44.46	3.68	43.40	69	73	8.95	103.33	7.77	90.83	5.45	64.40
30	34	3.85	45.24	3.82	44.96	3.72	43.82	70	74	9.24	106.61	7.93	92.68	5.46	64.58
31	35	3.89	45.77	3.87	45.47	3.76	44.26	71	75	9.55	110.02	8.07	94.41	5.47	64.73
32	36	3.94	46.33	3.91	46.01	3.80	44.72	72	76	9.86	113.56	8.23	96.15	5.48	64.86
33	37	3.99	46.92	3.96	46.58	3.84	45.19	73	77	10.18	117.23	8.36	97.84	5.49	64.96
34	38	4.05	47.53	4.01	47.16	3.88	45.67	74	78	10.52	121.02	8.49	99.48	5.50	65.04
35	39	4.10	48.17	4.07	47.78	3.92	46.17	75	79	10.86	124.93	8.62	101.05	5.50	65.10
36	40	4.16	48.84	4.12	48.42	3.97	46.69	76	80	11.21	128.94	8.75	102.54	5.50	65.10
37	41	4.22	49.54	4.18	49.09	4.01	47.22	77	81	11.57	133.06	8.86	103.95	5.50	65.10
38	42	4.29	50.27	4.24	49.78	4.06	47.76	78	82	11.94	137.26	8.96	105.27	5.50	65.10
39	43	4.35	51.04	4.30	50.52	4.11	48.32	79	83	12.31	141.53	9.06	106.48	5.50	65.10
40	44	4.42	51.84	4.37	51.26	4.16	48.89	80	84	12.68	145.86	9.15	107.60	5.50	65.10
41	45	4.50	52.69	4.44	52.05	4.21	49.48	81	85 and over	13.06	150.23	9.23	108.60	5.50	65.10
42	46	4.57	53.57	4.51	52.88	4.26	50.07	82	..	13.43	154.61	9.30	109.50	5.50	65.10
43	47	4.65	54.49	4.58	53.74	4.31	50.68	83	..	13.80	158.97	9.36	110.29	5.50	65.10
44	48	4.74	55.46	4.66	54.64	4.36	51.31	84	..	14.17	163.31	9.41	110.97	5.50	65.10
45	49	4.83	56.48	4.74	55.57	4.42	51.94	85 and over	..	14.52	167.57	9.45	111.56	5.50	65.10

Rental [illegible] of settlement

A16

IT IS NOT NECESSARY TO EMPLOY ANY PERSON, FIRM, OR CORPORATION TO COLLECT THE INSURANCE OR SECURE ANY BENEFIT UNDER THIS POLICY.

WRITE DIRECT TO THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, 393 SEVENTH AVENUE, NEW YORK, OR COMMUNICATE WITH THE NEAREST AUTHORIZED AGENT OF THE SOCIETY WHOSE DUTY IT IS TO FACILITATE ALL SETTLEMENTS WITHOUT CHARGE

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

393 SEVENTH AVE NEW YORK

CORPORATE AND ABSOLUTE OWNER FOR... SINGLE PREMIUM LIFE POLICY.

C-130949

No. 9,896,005

Owner - As stated on 2nd Page - MARY A. BOHNEN Insured

SUPPLEMENTARY CONTRACT SETTLEMENT

FACE AMOUNT $ 72,000

62

SINGLE PREMIUM $ 53,717.04

October 15, 1936.

Insurance payable at death. Single Premium. Annual Dividends.

AD 76.

Series

40 And afterwards, to wit, on the 25th day of September, 1951, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

41 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * Caption No.—Case No. 49 C 362 * *

MEMORANDUM AND ORDER

Campbell, District Judge.

Plaintiffs bring this action against the Collector of Internal Revenue for refund of an estate tax deficiency assessed against the estate of one Mary A. Bohnen, the mother of plaintiffs. The deficiency, including interest, amounts to $26,890.91.

The complaint alleges that Mary Bohnen died June 23, 1942. In October, 1935 the decedent, then 62 years of age, purchased a single premium life insurance policy in the face amount of $72,000. On the same day and in connection therewith, she purchased a life annuity contract, providing for an annual payment to her of $1618.03. The premium for the life policy was $53,717.04; and for the annuity, $22,602.96. Plaintiff also asserts, and there is no reason to doubt, that the insurance company required that the annuity contract be purchased as a condition of issuing the life policy. The life policy named the three plaintiffs as equal beneficiaries.

Decedent then and there assigned to plaintiffs equally, as a gift, all of her right, title and interest in and to the said life policy, which assignment carried with it, inter alia, the right to receive the cash surrender value of said policy, if plaintiffs so elected, and the right to receive dividends payable thereon. In 1936, the decedent filed a gift tax return, reporting gifts to plaintiffs of ⅓ interest each in said life policy.

The deficiency was assessed, and the claim for refund denied, upon the theory that the life insurance policy was in the nature of an investment as distinguished from life insurance and was, therefore, taxable in decedent's estate under Section 811(c) of the Internal Revenue Code, as a

> render the contract and obtain the surrender value thereof. The contracts designated her as the 'Owner' or 'Purchaser,' the decedent being called the 'Insured' or 'Annuitant.' In the event that the wife should predecease the decedent, the contracts provided that all of the enumerated powers were to vest in the decedent to the extent that such powers had not otherwise been exercised by the wife."

The contracts also provided that, if all the beneficiaries should predecease the decedent, the proceeds of the contract should be paid to his executors. The only mention made of the Le Gierse case is that the two contracts must be considered together and that they did not create an insurance risk. The Court then proceeded to discuss the question of whether the proceeds were includible in the gross estate, as being the subject of a transfer intended to take effect in possession or enjoyment at or after decedent's death, without further reference to Le Gierse and as a separate and distinct problem. It would seem, therefore, that the Le Gierse case is inapposite here. True, in the Goldstone case, the Court held that the proceeds of the life insurance policy should be included in the gross estate, but note the basis for the holding and the language employed:

> "The decedent, in making disposition of $25,000 of his property through these two contracts, retained a valuable interest in that amount which was not extinguished until he died. He retained not only the right to semi-annual payments under the annuity contract but also a contingent reversionary interest in the entire proceeds of both contracts. Had he survived his wife he could have exercised the attributes of ownership over the contracts, changing the beneficiaries or surrendering the contracts as he saw fit. If he had survived both his wife and his daughters the proceeds of the two contracts would automatically have been payable to his estate when he died. Thus the ultimate disposition of the proceeds of the contracts was suspended until the moment of decedent's death. Only then did the respective interests of the wife and daughters become fixed; only then were their interests freed from the contingency of the decedent's survival. His death was the decisive fact that terminated all of

his potential rights and insured the complete ripening of the wife's interests. The transfer of the proceeds of the contracts having been effectuated finally and definitely at the decedent's death, as in the Hallock case, #302(c) requires that those proceeds be included with the decedent's gross estate.

"This conclusion is unaltered by the fact that the wife had the unrestricted power during the decedent's
44 lifetime to exercise many important incidents of ownership over the contracts, including the power to terminate the decedent's reversionary interest in the proceeds. Whatever the likelihood of the exercise of this power, it is a fact that the wife did not change the beneficiaries or surrender the contracts so as to destroy decedent's reversionary interest. The string that the decedent retained over the proceeds of the contracts until the moment of his death was no less real or significant because of the wife's unused power to sever it at any time.

"The essential element in this case, therefore, is the decedent's possession of a reversionary interest at the time of his death, delaying until then the determination of the ultimate possession or enjoyment of the property. The existence of such an interest constitutes an important incident of ownership sufficient by itself to support the imposition of the estate tax. Helvering vs. Hallock, supra. The indefeasibility of that interest prior to death or the decedent's possession of other powers of ownership is unnecessary and indecisive of estate tax liability."

Consider, therefore, the facts of the present case in the light of the Goldstone decision. The decedent here retained no interest, contingent or otherwise, in the proceeds of the policies, even in the event that all the beneficiaries predeceased her. Further, the policy, in regard to ownership thereof, contained the following provision:

"Owner. The rights conferred upon the Owner by the terms of this policy shall be vested in the Insured's children, Edwin J. Bohnen, Theodore G. Bohnen and Virginia E. Bohnen, jointly during their lifetime. Upon the death of any one of the Insured's said children, such rights shall be vested in the survivors of them, jointly during their lifetime, or if only one of them be surviving, such rights shall be vested in the

survivor of them during his or her lifetime. Upon the death of the last survivor of the Insured's said children, such rights shall be vested in the executors or administrators of the last survivor of the Insured's said children.

"A person while thus vested with the rights of Owner, may, prior to the death of the Insured, exercise the rights conferred upon the Owner by the terms of this policy without the consent of the Insured or any special beneficiary."

From the foregoing, it should be clear that absolutely no reversionary interest of any type or description was retained or possessed by the decedent in the instant case. Since, therefore, that was the "essential element" in the Goldstone case, its absence here is a valid distinguishing factor. Insofar as the plaintiffs were concerned, there was no deferment of possession or enjoyment until at or after decedent's death, and hence was not within the scope of Section 811(c).

For the foregoing reasons, plaintiffs' motion for judgment on the pleadings is granted, and judgment will, therefore, enter in favor of plaintiffs. Plaintiffs are directed to prepare and submit to the Court, within 15 days hereof, a judgment proper as to form.

Campbell
Judge

September 25, 1951.

45 And afterwards on, to wit, the 30th day of October, 1951 came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Motion For Entry Of Judgment in words and figures following, to wit:

46 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * Caption No.—Case No. 49 C 362 * *

MOTION FOR ENTRY OF JUDGMENT

Now come Edwin J. Bohnen, Executor of the Estate of Mary A. Bohnen, and individually, Theodore G. Bohnen, and Virginia E. Bohnen, plaintiffs, by their attorneys McDermott, Will & Emery, George S. Stansell and James A. Dunkin, pursuant to the memorandum and order entered by this court on September 25, 1951 granting plaintiffs' motion for judgment on the pleadings and directing

plaintiffs to present a judgment proper as to form, and the order entered on October 10, 1951 extending plaintiffs' time to submit a form of judgment to and including October 30, 1951, and in support of this motion for the entry of the judgment tendered to the court herewith, these plaintiffs represent to the court as follows:

1. In this action plaintiffs seek a refund of the portion of the estate tax deficiency, including interest, paid on the Estate of Mary A. Bohnen to the defendant by reason of the inclusion in said estate of the proceeds of a cer-
47 tain life insurance policy in the sum of $72,094.81. The legality of the inclusion of said proceeds in said estate was the principal issue in this cause, on which this court held for the plaintiffs in said memorandum and order of September 25, 1951.

2. Attorneys' fees and other fees and expenses incurred by these plaintiffs in connection with the prosecution of this refund claim are also legitimate deductions from the gross estate of Mary A. Bohnen, pursuant to Reg. 105, Section 81.34 of the Treasury Department and cases decided thereunder. Said fees are in the sum of $5,500.00 and said other expenses are in the sum of $64.15, for a total additional deduction from said gross estate of $5,564.15.

3. A recomputation (attached hereto as Exhibit A) of the estate tax payable on the Estate of Mary A. Bohnen, after deducting the proceeds of the life insurance policy set forth in paragraph 1 hereof, and the fees and expenses set forth in paragraph 2 hereof, results in a reduction in the estate tax payable on said estate of $21,215.30. The portion of the interest paid on said estate tax deficiency and attributable to the erroneous inclusion in said estate of the proceeds of said life insurance policy, is $1,212.17. The total refund, including overpayment of interest, therefore is $22,427.47.

4. Interest on the said sum of $22,427.47 is allowed the plaintiffs at the rate of 6% per annum from the date of payment to the defendant, to-wit September 11, 1944, except as to the sum of $12.57 which was paid on December 23, 1944, to a date not more than thirty days preceding the
48 date of the refund check, pursuant to Title 28 of the United States Code, Section 2411.

5. If defendant moves for a rehearing or takes an appeal from this judgment, plaintiffs will incur liability for additional fees and expenses, which will constitute an additional deduction from said estate. Plaintiffs therefore request the

court to retain jurisdiction of this cause for the purpose of allowing such further refund of estate tax as may result from any such additional fees and expenses incurred in connection with any further litigation concerning this refund claim.

George S. Stansell
James A. Dunkin

McDermott, Will & Emery
111 West Monroe Street
Chicago 3, Illinois
FRanklin 2-2002

49 EXHIBIT A

RECOMPUTATION OF TAX PAYABLE ON ESTATE OF MARY A. BOHNEN

	For Basic Tax	For Additional Tax
Taxable Estate:		
Net estate after exemption (per Bureau of Internal Revenue)..	$81,171.73	$141,171.73
Less: Proceeds of life insurance policy	72,094.81	72,094.81
	$ 9,076.92	$ 69,076.92
Less: Fees and expenses in prosecuting refund claim.....	5,564.15	5,564.15
Net estate adjusted.....	$ 3,512.77	$ 63,512.77
Computation of Tax:		
Gross basic tax (1%).....	$ 35.13	
Less: State inheritance tax credit (80% of $35.13).....	28.10	
Net basic tax.....		$ 7.03
Basic and additional tax on first $60,000	$ 9,500.00	
Plus 28% of $3,512.77.....	983.58	
	$10,483.58	
Less: Gross basic tax.....	35.13	
Net additional tax		10,448.45
Total tax payable.....		$ 10,455.48
Refund Due:		
Estate tax assessed per return.		$ 6,173.25
Deficiency assessed		25,497.53
		$ 31,670.78
Estate tax as above.....		$ 10,455.48
		$ 21,215.30
Interest paid on deficiency attributable to overpayment: $1,456.85 x $21,215.30 / 25,497.53		— 1,212.17
Total refund due		$ 22,427.47

50 And afterwards, to wit, on the 9th day of November, 1951, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

51 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • Caption No.—Case No. 49 C 362 • •

JUDGMENT

This cause having come on for hearing on plaintiffs' motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, and the court having taken said motion on the briefs of the parties and, being fully advised in the premises, having entered an order on September 25, 1951 granting said motion,

It Is Therefore Ordered and Adjudged that plaintiffs have and recover of defendant the sum of $22,427.47, plus statutory interest on said sum at the rate of six per cent (6%) per annum from December 23, 1944 as to $12.57, and from September 11, 1944 as to the balance pursuant to Title 28 of the United States Code, Section 2411; and

It Is Further Ordered and Adjudged that this court retain jurisdiction of this cause for the purpose of allowing such further refund of estate tax to which plaintiffs may become entitled as a result of incurring liability for additional attorneys' fees and other expenses in connection with any rehearing or appeal from this judgment which defendant may take.

Enter:

Campbell
Judge

Dated: November 9, 1951.

52 And on the same day, to wit, the 9th day of November, 1951, there was filed in the Clerk's office of said Court a certain Government's Exhibit 1 in words and figures following, to wit:

53 GOVERNMENT'S EXHIBIT NO. 1

IT-EG-16926—1st Illinois
Estate of Mary A. Bohnen
Date of death—June 29, 1942

RECOMPUTATION OF ESTATE TAX LIABILITY IN ACCORDANCE WITH THE MEMORANDUM OF THE CHIEF COUNSEL DATED OCTOBER 31, 1951

	For Basic Tax	For Additional Tax
Net estate previously determined by the Technical Staff and reaffirmed in Bureau rejection of claim letter dated March 3, 1947	$81,171.73	$141,171.73
Adjustment pursuant to decision of District Court for the Northern District of Illinois, Eastern Division: Exclusion from gross estate of value of proceeds of life insurance policy #9,896,003	72,094.81	72,094.81
Net estate, recomputed	$ 9,076.92	$ 69,076.92
Gross basic tax	$ 90.77	
Less credit for gift tax	0.00	
Gross basic tax less gift tax credit	$ 90.77	
Less credit for State estate, inheritance, legacy or succession taxes	72.62	
Net basic tax		18.15
Total gross taxes (basic and additional)	$12,041.54	
Gross basic tax	90.77	
Gross additional tax	$11,950.77	
Less credit for gift tax	0.00	
Net additional tax		11,950.77
Total Net Tax, Recomputed		$ 11,968.92
Assessments and payments:		
Returned tax, July 1943 List, Page 105, Line 2, paid July 1, 1943		$ 6,173.25
Deficiency, October 1944 Special List, Page 191, Line 0 (paid on Sept. 11, 1944, $26,941.81)	$25,497.53	
Interest, same list (paid on Dec. 23, 1944 12.57)	1,456.85	
26,954.38	$26,954.38	26,954.38
Total		$ 33,127.63
54 2—Estate of Mary A. Bohnen		
Total (Brought forward)		$ 33,127.63
Total tax, recomputed	$11,968.92	
Interest	331.15	
Total tax and interest, recomputed		12,300.07
Overassessment and overpayment		$ 20,827.36

If the overpayment of tax in the amount shown herein is refunded, interest should be computed on $12.57 from December 23, 1944, and on the balance of $20,814.99 from September 11, 1944.

55 And afterwards, to wit, on the 12th day of December, 1951, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell District Judge, appears the following entry, to wit:

56 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • Caption No.—Case No. 49 C 362 • •

CERTIFICATE OF PROBABLE CAUSE

The Court having entered judgment herein in favor of the plaintiffs in the amount of $22,427.47 plus statutory interest at the rate of six per cent per annum from December 23, 1944 as to $12.57 and from September 11, 1944 as to the balance pursuant to Title 28 of the United States Code, Section 2411, and the Court finding that the recovery allowed herein against the defendant, Carter H. Harrison, is for acts done by him in his official capacity while acting as United States Collector of Internal Revenue for the First District of Illinois and is for money collected by him as internal revenue taxes and by him paid into the Treasury of the United States in the performance of his official duty, certifies that there was probable cause for the acts so done by the said Collector while acting under the directions of the Commissioner of Internal Revenue; and accordingly the Court orders and directs that execution issue under the aforesaid judgment against any individual property or estate of said defendant Collector, but that the amount so recovered by the plaintiff herein shall be paid out of the proper appropriation from the United States Treasury as provided by Section 2006 of Title 28, U.S.C. and Rule 69(n) of the Federal Rules of Civil Procedure.

Dated: Chicago, Illinois, the 12th day of December, 1951.

Enter: *Campbell*

Judge

57 And afterwards on, to wit, the 8th day of January, 1952 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Notice Of Appeal in words and figures following, to wit:

58 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • Caption No.—Case No. 49 C 362 • •

NOTICE OF APPEAL

Notice is hereby given that the defendant above named hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in the above-entitled case on November 9, 1951.

Otto Kerner, Jr.
Otto Kerner, Jr.,
United States Attorney,
Attorney for Defendant.

(Certificate of Mailing Attached Hereto):

59 United States of America }
Northern District of Illinois } ss:

• • Caption No.—Case No. 49 C 362 • •

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on January 8, 1952, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

George S. Stansell, James A. Dunkin
McDermott, Will & Emery
111 West Monroe Street
Chicago 3, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chi-

cago, Illinois, this 8th day of January, 1952.

(Seal)

Roy H. Johnson
Clerk
By Gizella Butcher
Deputy Clerk

60 And afterwards on, to wit, the 14th day of January, 1952 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Statement Of Points in words and figures following, to wit:

61 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * Caption No.—Case No. 49 C 362 * *

STATEMENT OF POINTS UPON WHICH DEFENDANT INTENDS TO RELY ON APPEAL.

1. The District Court erred in granting judgment in favor of plaintiff and in not granting judgment, as a matter of law, in favor of the defendant.
2. The District Court erred in finding and concluding, on the undisputed facts of the case, that the value of the so-called life insurance was not includible in decedent's taxable estate under Section 811(c) of the Internal Revenue Code.
3. The District Court erred in not including and holding, as a matter of law, that the retention by the decedent of a life interest in the income made the value of the investment taxable in decedent's estate under Section 811(c) of the Internal Revenue Code.
4. The District Court erred, as a matter of law, in granting plaintiff's motion for judgment on the pleadings.

Otto Kerner, Jr.
Otto Kerner, Jr.,
United States Attorney,
Attorney for Defendant.

62 State of Illinois } ss
County of Cook }

Thomas M. Lawlor, being first duly sworn, on oath deposes and says that he is employed as Clerk to the United

States Attorney for the Northern District of Illinois, at Chicago, Illinois; that on January 15th, 1952, he mailed a copy of the foregoing Statement of Points Upon which Defendant Intends to Rely on Appeal to Messrs. McDermott, Will & Emery, 111 West Monroe Street, Chicago, Illinois, attorneys for the plaintiffs herein.

Thomas M. Lawlor

Subscribed and sworn to before
me this 15th day of January,
A. D. 1952.
(Seal)

Anna L. Minahan
Notary Public.

63 And on the same day, to wit, the 14th day of January, 1952 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Designation of Contents of Record on Appeal in words and figures following to wit:

64 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * Caption No.—Case No. 49 C 362 * *

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

The defendant herein hereby designates the following portions of the record to be contained in the record on appeal in the above-entitled case:

1. Complaint filed March 1, 1949.
2. Answer of defendant filed June 9, 1949.
3. Motion of plaintiff for judgment on the pleadings, filed October 9, 1950.
4. Order on motion for judgment on the pleadings, entered October 9, 1950.
5. Annuity Policy and Life Insurance Policy issued by Equitable Life Assurance Society of United States, filed by plaintiffs on August 22, 1951, pursuant to rule on plaintiffs entered on August 15, 1951.
6. Memorandum and Order of Court entered on September 25, 1951.

7. Motion for entry of judgment, *dated October 30, 1951.*
8. Judgment entered November 9, 1951.
9. Government's Exhibit filed November 9, 1951.
10. Certificate of Probable Cause filed December 12, 1951.
11. Notice of Appeal filed January 8, 1952.

65 12. Statement of Points Upon which Defendant Intends to Rely on Appeal, filed January 15, 1952.

13. This Designation.

Otto Kerner, Jr.
Otto Kerner, Jr.,
United States Attorney,
Attorney for Defendant.

State of Illinois }
County of Cook } ss

Thomas M. Lawlor, being first duly sworn, on oath deposes and says that he is employed as Clerk to the United States Attorney for the Northern District of Illinois, at Chicago, Illinois; that on January ...., 1952, he mailed a copy of the foregoing Designation of Contents of Record on Appeal to Messrs. McDermott, Will & Emery, 111 West Monroe Street, Chicago, Illinois, attorneys for the plaintiffs herein.

Thomas M. Lawlor

Subscribed and sworn to before
me this 15th day of January,
A. D. 1952.
(Seal)

Anna L. Minahan
Notary Public

66 And afterwards on, to wit, the 7th day of February, 1952 came the Appellees by their attorneys and filed in the Clerk's Office of said Court their certain Information Required By Rule 10(c) of the United States Court of Appeals, for the Seventh Circuit in words and figures following, to wit:

67 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • Caption No.—Case No. 49 C 362 • •

INFORMATION REQUIRED BL RULE 10(c) OF COURT OF APPEALS FOR THE SEVENTH CIRCUIT

1. The appellees in this case are Edwin J. Bohnen, Executor of the Estate of Mary A. Bohnen, and individually; Theodore G. Bohnen, and Virginia E. Bohnen.

2. The attorneys for the appellees are William M. Emery, George S. Stansell and James A. Dunkin, 111 West Monroe Street, Chicago 3, Illinois.

Wm. M. Emery
George S. Stansell
James A. Dunkin
Attorneys for Appellees

McDermott, Will & Emery
111 West Monroe Street
Chicago 3, Illinois
FRanklin 2-2002

68 And on the same day, to wit, the 7th day of February, 1952 came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

69 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • Caption No.—Case No. 49 C 362 • •

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following original documents be certified and forwarded by the Clerk of this Court to the United States Court of Appeals for the Seventh Circuit in connection with the appeal in the above-entitled case in lieu of copies thereof:

1. Annuity Policy and Life Insurance Policy issued by Equitable Life Assurance Society of United States, filed by plaintiffs on August 22, 1951, pursuant to rule on plaintiffs entered on August 15, 1951.

2. Government's Exhibit No. 1, filed November 9, 1951.

Otto Kerner, Jr.
Otto Kerner, Jr.,
United States Attorney,
Attorney for Defendant.
McDermott, Will & Emery
By James A. Dunkin
Attorneys for Plaintiffs.

70 And on the same day, to wit, on the 7th day of February, 1952, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell District Judge, appears the following entry, to wit:

71 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • Caption No.—Case No. 49 C 362 • •

ORDER

Pursuant to stipulation and agreement by the parties hereto

It Is Hereby Ordered that the following original documents be certified and forwarded by the Clerk of this Court to the United States Court of Appeals for the Seventh Circuit in connection with the appeal of the above-entitled case, in lieu of copies thereof:

1. Annuity Policy and Life Insurance Policy issued by Equitable Life Assurance Society of United States, filed by plaintiffs on August 22, 1951, pursuant to rule on plaintiffs entered on August 15, 1951.
2. Government's Exhibit No. 1, filed November 9, 1951.

Enter:

Campbell
Judge.

Dated: February 7, 1952.

72 United States of America }
Northern District of Illinois } ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed in this Court in the cause entitled: Edwin J. Bohnen, Executor of the Estate of Mary A. Bohnen, and individually; Theodore G. Bohnen and Virginia Bohnen, Plaintiffs, Vs. Carter H. Harrison, Individually and as collector of Internal Revenue, Defendant, No. 49 C 362, as the same appear from the original records and files thereof, now remaining among the records of the said Court in my office, except the Original Annuity Policy and Life Insurance Policy issued by Equitable Life Assurance Society of United States and The Government's Exhibit 1, which are incorporated herein by direction of this court upon Stipulation of the parties herein.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 8th day of February, 1952.

Roy H. Johnson
Clerk

By Gizella Butcher
Deputy Clerk

(Seal)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, filed on the twenty-first day of April, 1952, in

Cause No. 10562

EDWIN J. BOHNEN, etc., et al., *Plaintiffs-Appellees*

vs.

CARTER H. HARRISON, etc., *Defendant-Appellant*

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th., day of December A. D. 1952.

KENNETH J. CARRICK
Clerk of the United States Court of Appeals for the Seventh Circuit.

SEAL

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the seventh day of October, in the year of our Lord one thousand nine hundred and fifty-two and of our Independence the one hundred and seventy-seventh.

No. 10562

EDWIN J. BOHNEN, Executor of the Estate of MARY A. BOHNEN, and individually; THEODORE G. BOHNEN and VIRGINIA E. BOHNEN, *Plaintiffs-Appellees*

vs.

CARTER H. HARRISON, individually and as Collector of Internal Revenue, *Defendant-Appellant*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

And afterwards, to-wit, on the 29th day of October, 1952, there was filed in the office of the Clerk of this Court the Opinion of the Court which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

OCTOBER TERM AND SESSION, 1952.

No. 10562.

EDWIN J. BOHNEN, Executor of the Estate of MARY A. BOHNEN, and individually; THEODORE G. BOHNEN and VIRGINIA E. BOHNEN, *Plaintiffs-Appellees,*

vs.

CARTER H. HARRISON, individually and as Collector of Internal Revenue, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 29, 1952.

Before DUFFY, LINDLEY and SWAIM, *Circuit Judges.*

LINDLEY, *Circuit Judge.* The Collector of Internal Revenue, defendant in the suit below, appeals from a judgment of the District Court granting the taxpayers' motion for judgment on the pleadings in an action to recover overpayment of estate taxes. The controlling facts, a clear analysis of the issues and an adequate exposition of the pertinent law appear in Judge Campbell's decision in *In re Bohnen,* 100 F. Supp. 118. However, because there are two decisions to the contrary, one of which was announced after the judgment below was entered, it may well be advisable, we think, to add our additional thought upon the questions presented.

The decedent bought two insurance contracts. One, an annuity policy, recited that, in consideration of the payment of a premium of $22,602.96, the insurance company would pay Mrs. Bohnen, until the date of her death, a fixed annuity of $1,618.03 annually. In the other, a life insurance policy, the company agreed, in consideration of the payment of a single premium of $53,717.04, to pay, upon receipt of due proof of the death of the insured, the sum of $72,000. Neither contract contains any reference to the other. The promise to pay the annuities was made in considera-

tion of one thing only, the payment of $22,602.96, and the agreement to pay the life insurance, upon the sole consideration of the payment of the single premium of $53,717.04.

Though the Supreme Court has decided that such an arrangement is in the nature of a single investment program and, therefore, not within the definition of insurance mentioned in the former act, $40,000 of which was then allowed to be deducted from the gross estate of a decedent, it does not follow that this investment program, made up of the two contracts, was indivisible. On the one hand, it is obvious that for the consideration of some $22,000 a fixed annuity of $1600 was bought and that, on the other, in consideration of the sum of some $53,000 advanced, the company agreed to pay, at the insured's death a fixed sum of $72,000. The annuities were not based upon and in no wise dependent upon any consideration given for the life policy. The money to be paid under the life contract was in no wise based or dependent upon the sum advanced to secure the annuities. They constituted independent units, two pieces of property. Consequently, when the insured immediately transferred and assigned all of her right, title and interest of every character in and to the policy of insurance, that unit of her estate passed to the assignees, and was no longer her property. It could, therefore, under no conception, constitute a part of her taxable estate when she died thereafter.

But, says the Collector, it is undisputed that the life policy would not have issued if the decedent had not also bought the annuity policy. This fact, we think, is without legal significance, for, as we have said, the decedent purchased two pieces of property, paying for one, which she retained, $22,000. For the other, the contract to pay $72,000 upon her death, she paid $53,000. The second agreement she immediately transferred by way of gift to her three children, making a gift tax return and paying the tax due thereon. She retained no interest in the life contract; thereafter, she no longer had any dominion over it. She did nothing to bring herself within the transfers made taxable by the Internal Revenue Code, either by making a transfer in contemplation of death or by retention of any interest or possibility of reverter.

The District Court discussed the case of *Burr* v. *Commissioner*, 156 F. 2d 871 (CA-2) and we need add little to its exposition. In that case the court considered a state of facts similar to that confronting us here to be within the doctrine of *Helvering* v. *LeGierse*, 312 U. S. 531. But the latter opinion decided only that the contracts, read together, constituted not insurance but an investment program. There, the life insurance policy had not been assigned. In the *Burr* case, the policy had been transferred, but the court seemed to think that that made no difference. In our opinion, in

the *Burr* case, the court went far beyond the narrow holding of the *LeGierse* case, where ownership of the life policy was retained by the decedent until the time of her death. In the *LeGierse* case the court could not well have taken any position other than the one it did take, it seems to us, for the policy-holder retained the insurance policy and all interest in and control over it until his death. Only then did it become due and payable, as a part of his estate.

In the *Burr* case the court said that the insured in "assigning the policies, was, in effect transferring a remainder while retaining a life interest or * * * retaining the enjoyment of the right of the income from the property." This is certainly not true of the present case, for here the insured retained no interest whatever in the insurance policy or in the income therefrom.

In *Conway* v. *Glenn*, 193 F. 2d 965 (CA-6), decided subsequently to the entry of the judgment here, the court followed the reasoning of *Burr* v. *Comr., supra*, attributing to the *LeGierse* decision controlling effect even where the policy is assigned. As we read the *LeGierse* opinion, the Supreme Court said nothing in it to impel the conclusion that, after complete assignment of the life insurance policy, the decedent retained any interest therein.

That the Supreme Court did not intend to decide that a previously assigned policy could properly be included in a decedent's estate at his death is apparent from its language in *Goldstone* v. *United States*, 325 U. S. 687 at 693 as follows: "In our view of the case we need not consider the alternative argument urged by the United States to the effect that the specific amendments to Section 302 (c) are also applicable since the decedent actually received an annual return from the contracts for a period which did not in fact end before his death." In other words, the specific question involved in this case was, in the *Goldstone* case, left undecided.

It is contended that the annuity payments constituted income from the life policy. It would seem that to state the proposition is to demonstrate its fallacy. The annuities were bought and paid for in the annuity contract, when the insured paid in $22,000. None of this came out of the life insurance premium. The life policy was fully paid for by the $53,000 advanced for it; no part of it contributed in any way to the annuities. If the assignees had cashed the life policy, as they had a right to do, the insured would have still been entitled to receive the annuities. The assignees were in truth, not by any fiction the absolute owners of the life policy, whereas the decedent kept for herself the annuity contract.

The judgment is affirmed.

DUFFY, *C.J.*, dissenting. In 1935, when decedent was 62 years of age, she purchased a life insurance policy in the face amount of $72,000, paying a single premium of $53,717.04. A physical examination of decedent was not required. On the same date and as a part of the same transaction she purchased an annuity contract for a single premium of $22,602.96, which provided for annual payments to her until her death of $1,618.03. The insurance company required that the annuity contract be purchased as a condition of issuing the life insurance policy to her.

The majority opinion points out that the contracts were separate, and that neither contained a reference to the other, and states that they constituted two independent pieces of property. While admitting that the United States Supreme Court in *Helvering* v. *Le Gierse, et al.*, 312 U. S. 531, held that a similar transaction to that in the case at bar was a single investment program, the majority states, "• • • it does not follow that this investment program, made up of the two contracts, was indivisible." It further states that the fact that the life insurance policy would not have been issued if decedent had not bought the annuity policy is without legal significance.

In reaching its conclusion, I think the majority gives only lip service to the decision of the Supreme Court in *Le Gierse*. In that case the life insurance policy, in standard form, containing the usual provisions including those for assignment or surrender, was issued to a woman 80 years of age, without physical examination, for a single premium less than the face of the policy. The company also issued an annuity policy for another premium, calling for annual payments to her until her death. The Supreme Court held that although both policies were on the face separate contracts, neither referring to the other, they must be considered together; that in case of a premature death, the gain to the insurance company on one policy would neutralize its loss under the other; and that there was in fact no insurance risk. The issue in that case, as stated by the court (p. 537), was: "The ultimate question is whether the 'insurance' proceeds may be included in decedent's gross estate," the statute at that time providing that insurance in excess of $40,000 was to be considered as a part of such estate. And the court ruled (p. 540): "The two contracts must be considered together. To say they are distinct transactions is to ignore actuality, for it is conceded on all sides and was found as a fact by the Board of Tax Appeals that the 'insurance' policy would not have been issued without the annuity contract. Failure, even studious failure, in one contract to refer to the other cannot be controlling."

In my opinion the majority refuses to accept the rationale on which the Supreme Court decided *Helvering* v. *Le Gierse, et al.*,

supra, and the companion cases of *Estate of Keller, et al.* v. *Commissioner*, 312 U. S. 543, and *Tyler* v. *Helvering*, 312 U. S. 657. While, as pointed out, the ultimate issue in the *Le Gierse* case was different than in the case at bar, the cases are alike in that in each a life insurance policy and an annuity contract were issued to the decedent as separate contracts, and in each the life insurance policy was issued without any medical examination and would not have been issued except in conjunction with the purchase of the annuity contract. In the case at bar the effect of the combination of contracts is that decedent invested a sum of money with respect to which she reserved the right to the income for her life, and transferred to her children, as the owners of the insurance policy, the right to receive the corpus at her death. In my opinion such a transfer is squarely within the provisions of Sec. 811 (c) (1)(B), Internal Revenue Code, and the insurance proceeds should be included in the taxable gross estate.

Except for the decision by the learned district judge who sat in this case, all cases on this point have been decided contrary to the holding of the majority herein. I think that the decision of the Second Circuit in *Burr, et al.* v. *Commissioner*, 156 F. 2d 871, certiorari denied 329 U. S. 785, and the decision of the Board of Tax Appeals in *Estate of Cora C. Reynolds, et al.* v. *Commissioner of Internal Revenue*, 45 B.T.A. 44, were correctly decided. In addition, the attention of the Sixth Circuit was particularly directed to the decision of the trial court in this case, and such view was rejected by that court in *Conway* v. *Glenn*, 193 F. 2d 965.

Feeling that the decision of the district court should be reversed, I must respectfully dissent.

A true Copy:

Teste:

.....

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

And on the same day, to-wit, on the 29th day of October, 1952, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

Wednesday, October 29, 1952

Before

HON. F. RYAN DUFFY, Circuit Judge
HON. WALTER C. LINDLEY, Circuit Judge
HON. H. NATHAN SWAIM, Circuit Judge

No. 10562

EDWIN J. BOHNEN, etc., et al., *Plaintiffs-Appellees*

vs.

CARTER H. HARRISON, etc., *Defendant-Appellant*

Appeal from the United States District Court for the Northern District of Illinois Eastern Division

---

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of the Opinion of the Court filed October 29, 1952, and the Judgment entered on the same day in

Cause No. 10562

EDWIN J. BOHNEN, etc., et al., *Plaintiffs-Appellees*

vs.

CARTER H. HARRISON, etc., *Defendant-Appellant*

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th., day of December A. D. 1952.

KENNETH J. CARRICK
Clerk of the United States Court of Appeals for the Seventh Circuit.

SEAL

☆U.S. GOVERNMENT PRINTING OFFICE 1953—237084/P.O.949

Supreme Court of the United States

No. 566, October Term, 1952

CARTER H. HARRISON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

EDWIN J. BOHNEN, EXECUTOR OF THE ESTATE OF MARY A. BOHNEN, AND INDIVIDUALLY, ET AL.

Order allowing certiorari

Filed March 9, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

246713—53

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. —

CARTER H. HARRISON, Individually and as COLLECTOR OF INTERNAL REVENUE, *Petitioner*

v.

EDWIN J. BOHNEN, Executor of the Estate of MARY A. BOHNEN, and Individually; THEODORE G. BOHNEN and VIRGINIA E. BOHNEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of Carter H. Harrison formerly Collector of Internal Revenue, individually, prays that a writ of certiorari issue to review the judgment of the Court of the Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the District Court (R. 33-38) is reported at 100 F. Supp. 118. The opinion (R.

55-57) and dissenting opinion (R. 58-59) of the Court of Appeals are reported at 199 F. 2d 492.

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1952. (R. 60) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

The decedent purchased a single-premium annuity contract and a single-premium life insurance policy in 1935. The life insurance policy was issued without physical examination and would not have been issued to the decedent except in conjunction with the purchase of the annuity contract. She assigned the life insurance policy to her children and received the annuity payments until her death.

The question is whether the decedent made a transfer of property in which she retained the right to the income for her life or for a period which did not in fact end before her death, so that the insurance proceeds would be includible in her gross estate under Section 811 (c)(1)(B) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and Regulations involved are set forth in the Appendix, *infra*, pp. 14-16.

STATEMENT

The judgment of the District Court in this case was entered by granting the taxpayers' motion for judgment on the pleadings. The pleaded facts may be summarized as follows:

In 1935, the decedent, who was then 62 years old, purchased a life insurance policy, in the face amount of $72,000, for a single premium of $53,717.04. On the same day, and in connection therewith, she purchased an annuity contract, which provided for annual payments to her until death of $1,618.03, for a single premium of $22,602.96. The insurance company required that the annuity contract be purchased as a condition of issuing the life policy, which required no physical examination. (R. 7-8, 33.)

The life policy named the decedent's children as beneficiaries. She also assigned the policy to them, transferring all her right, title and interest. This carried with it, among other things, the right to receive the cash surrender value, if the children so elected, and the right to receive the dividends payable thereon. The decedent filed a gift-tax return, reporting as gifts to her children a one-third interest for each in the life insurance policy. The decedent died on June 23, 1942. (R. 33.)

A deficiency in estate tax was determined due to the failure to include in the decedent's gross estate the proceeds of the life insurance policy which were payable after her death. The deficiency was paid,

a claim for refund was filed and denied, and this action to recover the asserted overpayment was filed. (R. 4, 33-34.)

The District Court, granting the taxpayers' motion for judgment on the pleadings, held that the proceeds of the life insurance policy were not properly includible in the decedent's gross estate. (R. 33-38.) The Court of Appeals affirmed, one judge dissenting. (R. 55-59.)

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in this case is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *Conway* v. *Glenn*, 193 F. 2d 965, and with the decision of the Court of Appeals for the Second Circuit in *Burr* v. *Commissioner*, 156 F. 2d 871, certiorari denied, 329 U. S. 785.

The factual situation, in its relevant details, is precisely the same in each of these three cases. In each, the decedent procured a policy of life insurance, without medical examination, for a single premium, and in connection therewith purchased an annuity contract from the insurance company. In each case the life insurance policy would not have been issued to the decedent without a medical examination except for the fact that the annuity contract was purchased as an integral part of the same transaction. Thereafter, each of the decedents assigned the insurance policy, but retained the right to receive the payments under the an-

nuity contract until death. After death, the proceeds of the life insurance policies were paid to the assignees.

In both the *Conway* and *Burr* cases, *supra*, it was held that the insurance policy and the annuity contract were not to be viewed as separate transactions, but that they constituted integral parts of a combination of contracts in which no true insurance risk was involved. Because they were issued in combination and because the insurer's risks under the life insurance policy were offset by what the decedent had invested with the insurance company in the form of the premium paid for the annuity contract, it was ruled that the entire transaction represented but a single investment under which the income, in the form of the annuity payments, was retained by the decedent for his lifetime, with the principal, the insurance proceeds, being paid to his assignees at death. Consequently, the *Conway* and *Burr* cases held that the so-called insurance proceeds paid to the decedent's assignees were includible in the decedent's gross estate subject to the estate tax under the provisions of the Internal Revenue Code which correspond to those which now appear in Section 811 (c)(1)(B) (Appendix, *infra*, pp. 14-15), and which required that there be included in the gross estate *inter vivos* transfers in which the decedent retained the right to the income from the property for his lifetime or for a period which did not in fact end before his

death. The same result was also reached in *Estate of Reynolds* v. *Commissioner*, 45 B.T.A. 44.

The Court of Appeals in the present case, however, has reached the opposite conclusion. Refusing to accept the basic rationale of the *Conway* and *Burr* decisions (R. 57; and see dissenting opinion, R. 59),[1] the court below ruled that the insurance policy and the annuity contract "constituted independent units, two pieces of property" (R. 56), so that the retention by the decedent of the right to receive the annuity payments during her lifetime did not require the proceeds of the insurance policy to be included in her gross estate under Code Section 811 (c)(1)(B).

The decision below is also inconsistent, in principle, with the decision of this Court in *Helvering* v. *LeGierse*, 312 U. S. 531, and in the companion cases of *Estate of Keller* v. *Commissioner*, 312 U. S. 543, and *Tyler* v. *Helvering*, 312 U. S. 657. Accord: *Goldstone* v. *United States*, 325 U. S. 687, 690. In the *LeGierse* case, as here, the decedent was issued a single-premium policy of insurance on her life. The policy, which was obtained without medical examination, would not have been issued except for the fact that, contemporaneously, she purchased a single-premium annuity contract from the insurance company. The issue in the *LeGierse*

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[1] In *Conway*, the Sixth Circuit had said (193 F. 2d at 968) that it was "not in accord with" the decision of the district court in this case, which the court below affirmed.

case was whether the insurance proceeds, which were paid after the decedent's death to the beneficiary designated by her in the policy, were includible in the gross estate "as insurance," which Section 302 (g) of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended, required to be included in the gross estate "to the extent of the excess over $40,000," or whether the entire proceeds were to be included in the gross estate under Section 302 (c) of the 1926 Act, as amended (similar to Code Section 811 (c)(1)(C)) as a transfer intended to take effect in possession or enjoyment at or after death.

This Court decided that the proceeds paid under the life insurance policy were not to be regarded "as insurance" under Section 302 (g), and that the entire amount of the proceeds was includible in the gross estate under Section 302 (c). In so holding, this Court, differing with the conclusions reached by the Board of Tax Appeals in that case, ruled that the insurance policy and the annuity contract could not be considered as separate, distinct contracts. Even though, on their face, they appeared to be independent contracts, the fact that the insurance policy would not have been issued without the annuity contract was considered as conclusively requiring that the two contracts be viewed as a single whole. In this combination of contracts, it was held that the risks of one neutralized the risks of the other, so that no true insurance was

involved. Any risk involved was considered as (312 U. S. at p. 542)—"an investment risk similar to the risk assumed by a bank * * *."

The principle on which the decision in *LeGierse* rests, accordingly, was stated by the Court as follows (p. 540):

> The two contracts must be considered together. To say they are distinct transactions is to ignore actuality, for it is conceded on all sides and was found as a fact by the Board of Tax Appeals that the "insurance" policy would not have been issued without the annuity contract. Failure, even studious failure, in one contract to refer to the other cannot be controlling. * * *

The principle on which the decision below rests stands in marked contrast. The fact that the insurance policy would not have been issued without the annuity contract—which impelled this Court to conclude that the contracts in *LeGierse* must be considered together rather than as distinct transactions—was thought by the court below to be "without legal significance" and to be no impediment to its conclusion that "they constituted independent units, two pieces of property." (R. 56) We believe, with the dissenting judge below (R. 58), that "the majority refuses to accept the rationale on which the Supreme Court decided *Helvering* v. *LeGierse* * * *."

2. The decision below is wrong. If the decedent, instead of paying two separate premiums and receiving two separate contracts, had paid to the insurance company the single sum of $76,320 for a single contract which would have given her the right to receive $1,618.03 per year for the balance of her life and which would have given her children the irrevocable right to receive the principal sum, less the insurance company's loading factor,[2] *i.e.*, $72,000 on her death, it would be overwhelmingly clear that the transfer would have been covered by the express terms of Section 811 (c)(1)(B) of the Internal Revenue Code. The retention by the decedent of the income during her lifetime and the postponement until her death of the payment of the principal to her assignees would be the very kind of testamentary substitution which Congress intended should be subjected to the estate tax. See *Commissioner* v. *Estate of Church*, 335 U. S. 632, 646.

The situation here, quite plainly, is substantially the same as that described above. The decedent invested a sum with the insurance company, she received the income during her lifetime, and her assignees received the principal sum after her death. While the decedent made an assignment to her children during her lifetime of the so-called life insurance policy, it is clear that they received full possession and enjoyment only by reason of

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[2] *Helvering* v. *LeGierse*, 312 U. S. 531, 542.

her death.[3] This is the very type of *inter vivos* transfer which Section 811 (c)(1)(B) of the Internal Revenue Code was designed to cover, and the court below was plainly wrong in holding to the contrary and in failing to follow the decisions of *Conway* v. *Glenn,* 193 F. 2d 965 (C.A. 6th); *Burr* v. *Commissioner,* 156 F. 2d 871 (C.A. 2d), certiorari denied, 329 U. S. 785; and *Estate of Reynolds* v. *Commissioner,* 45 B.T.A. 44. Further, the fact that the parties have attempted to make distinct transactions out of a combination of contracts which, as *Helvering* v. *LeGierse,* 312 U. S. 531, shows, must be considered together, cannot alter the incidence of the estate tax which does not permit legal niceties and convenient forms to disguise the testamentary nature of a disposition of property which is accomplished by means of an *inter vivos* transfer. *Commissioner* v. *Estate of Church,* 335 U. S. 632, 646; *Goldstone* v. *United States,* 325 U. S. 687, 691; *Helvering* v. *Hallock,* 309 U. S. 106, 112, 117-118.

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[3] The fact that the children could have taken the smaller cash surrender value during the decedent's lifetime does not alter the situation. In the clearest case covered by the statute, *i.e.*, where the decedent makes an *inter vivos* transfer of a remainder after carving out a life estate, the remainderman can, absent express restrictions in the transfer, sell his interest at a discounted value. Further, the children did not accept the cash surrender value and did receive the full principal after the decedent's death. Section 811 (c)(1)(B) expressly covers the situation where a decedent's interest "does not in fact end before his death."

3. The decision below raises an issue of continuing importance in the administration of the estate tax. The use of such a combination of insurance and annuity contracts is a fairly common device, as is suggested by the number of appellate decisions involving such contracts. The 1942 amendments, applicable to estates of decedents dying thereafter, may not obviate, even as to such estates, the effect of the decision below. Section 404 of the Revenue Act of 1942, c. 619, 56 Stat. 798, effective with respect to estates of decedents dying thereafter, amended Section 811 (g) of the Internal Revenue Code in important respects. H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 162-163 (1942-2 Cum. Bull. 372, 490-492); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 234-236 (1942-2 Cum. Bull. 504, 676-677); H. Conference Rep. No. 2586, 77th Cong., 2d Sess., p. 69 (1942-2 Cum. Bull. 701, 725). Under Section 811 (g)(2), as amended, for example, if a decedent pays the premiums on a policy of insurance on his own life, the full amount of the proceeds received by the beneficiaries is to be included in the decedent's gross estate even though the policy has been irrevocably assigned during the decedent's lifetime and even though he has retained none of the incidents of ownership.

Section 811 (g) of the Internal Revenue Code, however, like Section 302 (g) of the 1926 Act, as amended, which was construed in *Helvering* v. *LeGierse*, 312 U. S. 531, applies only to

amounts "receivable * * * as insurance." If Section 811 (g) should be considered to be inapplicable to the type of combination of contracts involved in this case because, as held in *Helvering* v. *LeGierse, supra,* and in *Goldstone* v. *United States,* 325 U. S. 687, 690,[4] no "insurance" is involved, and if the decision of the court below is permitted to stand unreversed, such transfers may continue to go untaxed, at least in the Seventh Circuit, contrary to what we believe is the plain intention of Congress. Hence, review of the decision below is warranted not only because of its effect as to estates of decedents dying in 1942 and prior years, but also because of the uncertainties which it creates for subsequent years.

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[4] In *Goldstone* v. *United States, supra,* p. 693, the Court found it unnecessary to consider the question presented by this case which was urged as an alternative argument there.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

WALTER J. CUMMINGS, JR.,
Solicitor General.

JANUARY, 1953

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * *

(c) [as amended by Section 7 (a) of the Act of October 25, 1949, c. 720, 63 Stat. 891] *Transfers in Contemplation of, or Taking Effect at, Death*—

(1) *General Rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

* * *

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either

alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; or

* * *

(26 U.S.C. 1946 ed., Supp. III, Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

Sec. 81.18 [as amended by T. D. 5834, 1951-1 Cum. Bull. 72]. *Transfers with possession or enjoyment retained*—(a) *General Rule.*—Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, section 811 (c)(1)(B) requires the inclusion in the gross estate of the value of all property transferred by the decedent, whether in trust or otherwise, if the decedent retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property (1) for his life; or (2) for any period not ascertainable without reference to his death; or (3) for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period. Except as provided in paragraph (b) of this section, such property is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

* * *

(b) *Estate of decedents dying before January 1, 1950.* In the case of a decedent who died before January 1, 1950, property shall not be included in the gross estate under this section unless transferred—

(1) after March 3, 1931, and before June 7, 1932, and the retention or reservation by the decedent was (A) for his life or (B) for such a period as to evidence his intention that it should extend at least for the duration of his life, and his death occurs before the expiration of such period; or

(2) on or after June 7, 1932.

* * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 566

CARTER H. HARRISON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE,
Petitioner,

vs.

EDWIN J. BOHNEN, EXECUTOR OF THE ESTATE OF MARY A. BOHNEN, AND INDIVIDUALLY; THEODORE G. BOHNEN AND VIRGINIA E. BOHNEN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 566.

CARTER H. HARRISON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE,
Petitioner,

vs.

EDWIN J. BOHNEN, EXECUTOR OF THE ESTATE OF MARY A. BOHNEN, AND INDIVIDUALLY; THEODORE G. BOHNEN AND VIRGINIA E. BOHNEN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

OPINIONS BELOW.

The opinion of the District Court (R. 33-38) is reported at 100 F. Supp. 118. The opinion (R. 55-57) and dissenting opinion (R. 58-59) of the Court of Appeals are reported at 199 F. 2d 492.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 29, 1952. (R. 60.) The petition for a writ of certiorari was filed on January 26, 1953, and was granted on March 9, 1953. (R. 63.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

STATUTE.

The applicable provisions of the statute involved are set forth in the Appendix hereto. The statute is set forth in the same form used in petitioner's brief, *i. e.*, as amended in 1949, in order to obviate confusion in reference. The language is precisely the same as that in effect at the time of the death of decedent in 1942, although somewhat rearranged.

SUMMARY OF ARGUMENT.

Decedent purchased a life insurance contract and an annuity contract. The life contract would not have been sold without the annuity contract. She then made an absolute gift of the life insurance contract to her children, retaining no interest in it. If it be assumed that both contracts were acquired in a single integrated transaction, they were nevertheless divisible and were in fact completely severed by the decedent, just as shares of stock might have been acquired in a single transaction and subsequently severed by a gift of part and a retention of the balance. Decedent reserved no interest of any kind, reversionary or otherwise, in either the life insurance contract or the income therefrom.

The present situation involves no possible aspect of tax avoidance, and falls within neither the letter nor spirit of Section 811 (c)(1)(B). Decedent retained the annuity contract which she could have purchased without the life insurance contract. (Instead of purchasing the life insurance contract, she could have made a cash gift to the donees of the amount of the premium.) The retained interest situations subject to Section 811 (c)(1)(B) always involve an arrangement in which the donee's interest is diminished for the advantage of the decedent. Here, if anything, the converse was true. The purchase of the annuity contract was a condition to the procuring of the life insurance contract for decedent's children. Moreover, such benefits as were conferred on the children were complete and irrevocable at the time of purchase, and nothing further passed from decedent to the donees at death, either in fact or in theory.

Helvering v. *LeGierse*, 312 U. S. 531 (1931), is inapplicable to the instant case. In that case decedent retained full ownership of both policies until death. The case merely held that the issuance of the two contracts in a single transaction obviated the "insurance risk" which would otherwise have been present. In *Goldstone* v. *United States*, 325 U. S. 687 (1945), the Supreme Court specifically declined to extend the *LeGierse* case to the instant situation.

The instant case involves no question of an insurance exemption in view of the present condition of the Code; hence the nature of the property originally acquired by decedent, or whether acquired in one or two transactions, is utterly immaterial. Nevertheless, petitioner devotes virtually his entire brief to this false issue and ignores the determinative fact of what decedent did with the property she had acquired.

The annuity payments were not the income from the life insurance premium, but rather comprised of income and principal of the annuity premium. The income from the life insurance premium consisted of the dividends on that policy and the increase in value of that policy from 65.8% to 100% of face value. (R. 25.) Both of these items of income were irrevocably assigned to respondents with the contract and collected by them.

Respondents were entitled to surrender the life insurance policy at any time after one year from date of issuance, and receive amounts ranging upward from $47,376. (R. 25.) Despite such surrender decedent would have continued to receive the annuity payments. Income is the fruit which grows upon the tree of principal. Fruit which continues to grow after a tree is cut must grow upon some other tree. The tree upon which the annuity payments grew was not the life insurance premium, but the annuity

premium, and the payments constituted in part a liquidation of the latter tree itself.

Respondents concede that petitioner's position is sustained by the cases of *Estate of Reynolds* v. *Commissioner*, 45 B. T. A. 44 (1941), *Burr* v. *Commissioner*, 156 F. 2d 871 (C. C. A. 2, 1946), and *Conway* v. *Glenn*, 193 F. 2d 965 (C. A. 6, 1952), but contend that these cases were erroneously decided and should be repudiated by the court. They are erroneous for the following reasons:

1. They misconceive the holding in the *LeGierse* case.
2. They confine attention to the nature and character of the property and treat the transfer as of no significance.
3. They misconceive the holdings in *Commissioner* v. *Clise*, 122 F. 2d 998 (C. A. 9, 1941) and *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281 (C. A. 5, 1941).
4. They confuse the several clauses of Section 811 (c) and disregard the purpose underlying the imposition of the estate tax on *inter vivos* transfers.
5. They err in concluding that the annuity payments constituted income from the combined premiums.

The results reached by the courts below could be independently arrived at by conceding the petitioner's contentions on all other points and applying the apportionment provisions of Section 81.18 of the Estate Tax Regulations, 105.

ARGUMENT.

I.

THE COURT OF APPEALS PROPERLY HELD THAT THE DECEDENT MADE AN ABSOLUTE GIFT OF A LIFE INSURANCE POLICY; THAT SHE RESERVED NO INTEREST THEREIN; AND THAT THE PROPERTY SO TRANSFERRED WAS NOT INCLUDIBLE UNDER SECTION 811 (c)(1)(B) OF THE INTERNAL REVENUE CODE.

Petitioner states his position as follows:

> "It is the position of the Collector that the entire transaction was one in which the decedent made a single investment, the income from which she reserved to herself for her lifetime and the principal of which she gave to her children to be paid at her death. A transfer of this nature falls squarely within the language and intended scope of Section 811 (c)(1)(B)." (Pet. Br. 7.)

Of the seventeen pages devoted to argument in his brief, virtually all is devoted to jousting with one of two "straw men":

> (1) Whether the two policies constitute "insurance."
>
> (2) Whether, if decedent did transfer property and retain the income therefrom for her lifetime, the property transferred is includible under Section 811 (c)(1)(B).

Neither of these propositions is in controversy. Respondents concede *arguendo* that there is no "insurance" involved in this case, that each of the "policies" may be regarded merely as an investment contract, that both were acquired by the decedent in a single transaction, and that the insurance company would not have sold the life con-

tract without the annuity contract. Respondents also concede that if the decedent did in fact transfer property and retain for he[illegible] lifetime the income from that property, then such property is includible under Section 811 (c)(1)(B) and the decision below should be reversed.

Respondents desire to dispel at the outset the suggestion implicit in petitioner's brief[1] that the transactions here referred to were or could have been availed of as a device for tax avoidance. In *Helvering* v. *LeGierse*, 312 U. S. 531 (1941), and similar situations where the decedent retained ownership of the policy, there was a tax avoidance objective in connection with the special insurance deduction under Section 302 (g) of the Revenue Act of 1926, then in effect. There is not even that in the present case. Characteristic of all the situations arising under the retention of interest clause is the desire of the decedent both to retain the use of the property transferred until death, and at the same time to avoid estate tax upon it. In the instant case, decedent made an irrevocable transfer, and in no sense did she retain the use of the property. The only interest which she retained or desired to retain was in the form of the annuity payments received solely from the annuity policy. There was no requirement that she purchase the life insurance policy as a condition to the purchase of the annuity policy. She could have accomplished her purpose just as well by simply buying the annuity policy, and making a gift of cash to the transferees in the amount of

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1. *E. g.*, in the footnote on page 18 of petitioner's brief:

"In *Helvering* v. *Bullard*, 303 U. S. 297, 302, and in *Commissioner* v. *Estate of Church*, 335 U. S. 632, 638, this Court repeated with approval the observation made in *Matter of Keeney*, 194 N. Y. 281, 287, affirmed, 222 U. S. 525, to the effect that—

> It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is a transfer with reservation of a life estate."

the premium allocated to the life policy. This would certainly not have been tax avoidance. To no greater extent do the facts of the instant case constitute tax avoidance.

The real and only issue in this case is whether or not decedent did in fact make a transfer of property and retain the income from that property during her lifetime. Even more specifically stated, the issue is: Were the annuity payments the "income" from the life policy transferred to respondents? The Court of Appeals below aptly said (R. 57):

> "It is contended that the annuity payments constituted income from the life policy. It would seem that to state the proposition is to demonstrate its fallacy. The annuities were bought and paid for in the annuity contract, when the insured paid in $22,000. None of this came out of the life insurance premium. The life policy was fully paid for by the $53,000 advanced for it; no part of it contributed in any way to the annuities. If the assignees had cashed the life policy, as they had a right to do, the insured would have still been entitled to receive the annuities. The assignees were in truth, not by any fiction the absolute owners of the life policy, whereas the decedent kept for herself the annuity contract."

In his argument petitioner nowhere actually addresses himself to the real issue, beyond stating the conclusion that the annuity payments constituted the income from the life policy, and asking the court to assume this ultimate issue upon the authority of decisions cited. (B. 12 and 13.) Certain of these decisions support petitioner's contention; the others are inapplicable. *Estate of Reynolds* v. *Commissioner*, 45 B. T. A. 44 (1941); *Burr* v. *Commissioner*, 156 F. 2d 871 (C. A. 2d, 1946), certiorari denied, 329 U. S. 785; and *Conway* v. *Glenn*, 193 F. 2d 965 (C. A. 6th, 1952), cited

in the order of decision, do support petitioner's position.[2] These cases are substantially identical factually with the case at bar. Respondents conceded this at the time they filed their motion for summary judgment in the district court. They did not attempt to distinguish these cases then and they do not do so now.[3] It is respondents' position that these cases were erroneously decided and should be repudiated by this court. Necessarily, a major portion of this brief is devoted, as were the briefs in the courts below, to an analysis of these cases, and particularly of the *Burr* case.

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2. Petitioner also cites (B. 12) *Bank of New York* v. *Kelly*, 135 N. J. Eq. 418 (1944), involving a somewhat similar issue arising under a state succession tax. That case follows the reasoning and authority of *Estate of Reynolds* v. *Commissioner*, 45 B. T. A. 44 (1941).

3. It would seem that the doctrine of these cases as well as certain originally erroneous doctrines of the common law, has arisen from the tendency prevalent among lawyers to attempt to distinguish upon a basis of comparatively insignificant facts cases erroneously decided, rather than challenging the basis for the erroneous decision. This has apparently occurred in connection with the present problem. The factual situation of all three cases was substantially the same (as is that of the instant case), except that in the *Reynolds* case the life insurance policies were transferred irrevocably to a trustee rather than to the ultimate beneficiaries, and except that the transfers there were made in conjunction with certain other revocable trust transfers, which doubtless influenced the Board of Tax Appeals and lent some semblance of color to the Commissioner's contention. In the *Burr* case, counsel for the taxpayer, rather than assailing the soundness of the *Reynolds* decision, apparently attempted to distinguish that case on the facts. In the *Burr* case, the Court refers to the *Reynolds* case as follows:

> "In that case, too, the assignment was irrevocable; and it is not to be distinguished, as petitioners claim, because it was to a trustee. The interposition of the trustee was of no significance; he had power to assign and to surrender the policy, and was required to distribute all dividends to the beneficiaries. The case was noted with approval in 42 Col. L. Rev. 162." [156 F. 2d 871, 872.]

In *Conway* v. *Glenn*, 193 F. 2d 965, taxpayer's counsel sought to distinguish the *Burr* case upon a basis of the following facts stated in the opinion of the Court of Appeals (p. 966):

> "After this transfer was made by the decedent and during

The other cases cited by petitioner are wholly inapplicable and lend his position no support. These cases fall into three categories, typified respectively by the following cases:

Igleheart v. *Commissioner,* 174 F. 2d 605 (C. A. 7th, 1949).

Commissioner v. *Clise,* 122 F. 2d 998 (C. A. 9th, 1941).

Helvering v. *LeGierse,* 312 U. S. 531.

For the most part, these cases are examined and distinguished at length later in this brief. In none of these cases did the beneficiary receive anything susceptible of enjoyment during the lifetime of the decedent, and in each of these cases the beneficiary was required to survive the decedent to receive any benefit. The *Igleheart* case involved a straight investment contract, with stipulated payments of income, and principal payable on demand or on death.

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his lifetime, the owners of the life insurance policy on two occasions exercised rights under the contract: (1) they named their mother as beneficiary to receive fixed monthly payments from the proceeds of the policy on the death of their father; and later (2) they changed the beneficiary interest in the policy so that their mother would receive only the interest income on the face amount of the policy."

The following extract from page 12 of Appellant's Brief in *Conway* v. *Glenn* indicates the argument made:

"The government contends that the instant case is on all fours with the *Burr* case, *supra.* A very important distinction can be made, however. In the *Burr* case, *supra,* the sons exercised none of their rights of ownership during their father's lifetime. In the case at bar, the children, who are the sole owners of the life policy, exercised their unrestricted rights of ownership by assigning to their mother, if she should survive the decedent, the entire income from the policy for her life (R. 23, 24). They thereby diminished their interest in the property."

Upon payment of principal, income ceased.[4] The *Clise* case involved joint and survivor annuity contracts in each of which decedent had named herself as primary annuitant, and some other person as a second annuitant to receive the annuity after her death, and until the second annuitant's death. In neither the *Igleheart* nor *Clise* cases was it possible to withdraw any principal sum from the insurance company and still have the stipulated payments continue to any party. In both cases the payments did in fact consist of income from the total premiums invested.

The only question determined by the Supreme Court in the *LeGierse* case was that in the case of annuity and life insurance policies, such as those here under consideration, the policies should be treated as a single investment contract, the risks of which neutralize one another, and that therefore, the life insurance contract did not constitute

4. The case involved the question of whether or not the payments were taxable for income tax purposes as annuity payments under Section 22 (b)(2). The Court held that they were not and that such payments were income in their entirety. The pertinent facts are stated by the Court as follows (174 F. 2d 605):

> "Prior to the taxable year 1941 taxpayer had purchased nine insurance contracts from three insurance companies, each providing for the payment of a fixed principal sum to the taxpayer upon his surrender of the contract (or to designated beneficiaries upon his death) and for annual payments to him in the interim. Each contract was issued in consideration of a single premium. A medical examination was not a prerequisite for any of the contracts. The premiums paid by taxpayer were not computed with reference to his age or tables of mortality, but in each contract the premium was equal to the principal sum of the contract plus an additional 5%, except for two contracts for which he paid an additional 6%. The premium for each contract was the same as charged any applicant for a similar policy regardless of age and sex.
>
> "Except for a small percentage charge, the principal sum of each contract corresponds with the single premium paid therefor. Upon surrender of the contract at any time, the principal sum thereof is payable to taxpayer. No matter how many annual payments he may have received, he is still entitled, on demand, to have the principal sum returned to him intact."

"insurance" within the purview of Section 302 (g)[5] so as to entitle the estate to the $40,000 deduction for insurance therein provided, a deduction subsequently eliminated from the Code. There was no other question pending before the Court, and no other question was decided by the Court. In the *LeGierse* case both contracts with the insurance company remained the property of the decedent at his death; hence, there could be no possible question as to "includibility" in the gross estate. The question was solely one of a deduction, which could not possibly arise unless includibility were assumed or conceded. It is true that the Court said that the deficiency in the *LeGierse* case had been properly assessed, but simply because the deduction claimed by the taxpayer could not be allowed.

Petitioner takes the position, as did the courts in *Estate of Reynolds* v. *Commissioner,* 45 B.T.A. 44 (1941); *Burr* v. *Commissioner,* 156 F. 2d 871 (C. A. 2d, 1946) certiorari denied, 329 U. S. 785; and *Conway* v. *Glenn,* 193 F. 2d 965 (C. A. 6th, 1952), that the *LeGierse* case is dispositive of the present issue. This assumption is one in which the Supreme Court itself has specifically declined to concur. *Goldstone* v. *United States,* 325 U. S. 687, 693 (1945).

In the *Goldstone* case the decedent had purchased a single premium life insurance policy and an annuity contract under the arrangement common to most of the cases herein referred to. The life policy designated his wife, his daughters, or his estate as beneficiaries, in the order named. Both policies gave the decedent's wife the unrestricted

5. Prior to amendment in 1942, Sec. 811 (g), formerly 302 (g) read as follows:

> "(g) Proceeds of Life Insurance.—To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

power to assign them, borrow money, receive dividends, change beneficiaries, and surrender the contract and obtain the surrender value thereof. Provision was made that if the wife predeceased the decedent, then the rights of ownership should vest in the decedent to the extent that such powers had not otherwise been exercised by the wife. At the time of decedent's death, he was survived by his wife and daughters, and the wife had not surrendered, assigned, or otherwise alienated either of the contracts.

Two questions were presented in the case: One as to whether or not the taxpayer was entitled to the specific "insurance" exemption provided in Section 302 (g), and the second, whether or not the proceeds of the life insurance policy were includible in the gross estate. The court cited and relied upon the *LeGierse* case, solely for the purpose of ruling against the taxpayer with reference to the applicability of the insurance exemption provisions of Section 302 (g). With reference to the second question, *i. e.*, whether or not the proceeds of the life policy should be includible in the gross estate, the court made no reference whatever to the *LeGierse* case, but predicated includibility squarely upon *Helvering* v. *Hallock*, 309 U. S. 106 (1940),[6] that the decedent retained "a contingent reversionary interest in the entire proceeds of both contracts."

Attention is particularly invited to the fact that the government urged upon the court the argument relied upon in the instant case, and subsequently approved by the Second Circuit Court of Appeals in the *Burr* case, and that the

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6. Decedent had transferred property into trust, giving the income to his wife for life, and providing that upon her death the corpus should be delivered to decedent, or, if he were not alive, to his children. The court held that the retention of the reversionary interest by the decedent rendered the property includible under § 302 (c), now § 811 (c) as having passed by a transfer "intended to take effect in possession or enjoyment at or after his death."

court specifically declined to pass upon that argument. The court used the following language (325 U. S. 687, 693):

> "In our view of the case we need not consider the alternative argument urged by the United States to the effect that the specific amendments to §302 (c) are also applicable since the decedent actually received an annual return from the contracts for a period which did not in fact end before his death."

It should be remembered that the opinion in the *Goldstone* case was written by Mr. Justice Murphy, who wrote the opinion in the *LeGierse* case. Had it been the intention of the court in the *LeGierse* case to lay down as broad a doctrine as that contended for by the government, and approved in the *Burr* case, certainly no one would have been better aware of that intention than Mr. Justice Murphy. Yet in the *Goldstone* case, the Court, speaking through Mr. Justice Murphy, declined to adopt any such doctrine. This was in 1945, four years after the *Reynolds* case, and only a year before the *Burr* case.

II.

THE CONTENTION OF PETITIONER ATTACHES UNDUE SIGNIFICANCE TO THE CHARACTER OF THE PROPERTY AND THE RELATIONSHIP OF DECEDENT TO THE INSURANCE COMPANY, AND IGNORES THE PARAMOUNT CONSIDERATION OF THE CHARACTER OF THE TRANSACTION WHICH WAS MADE WITH REFERENCE TO THE PROPERTY AND THE LEGAL EFFECTS THEREOF.

As suggested at the outset, petitioner has devoted by far the major portion of its argument to consideration of the nature of the contractual relations between decedent and the insurance company, and apparently attaches so much importance to this consideration that he tends to treat as of no significance the actual transaction upon

which the assertion of the tax is predicated, *i. e.*, the transfer.[7] The question of taxability must be determined on a basis of the following provision of the statute:

> "To the extent of any interest therein of which the decedent has at any time made a transfer * * * under which he has retained for his life * * * (i) the possession or enjoyment of, or the right to the income from, the property * * *." (I. R. C., Section 811 (c)(1)(B).)

Immediately after stating his position, petitioner addresses himself to what he apparently believes to be the crux of the argument:

> "1. In determining the applicability of Code Section 811 (c)(1)(B) to the circumstances of this case, the initial and crucial inquiry must focus on the essential nature of the transaction between the decedent and the insurance company."

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7. Thus petitioner brushes aside as not material or of no significance—

(1) The fact that assignees of the life policy could have surrendered it at any time (Pet. Br. 5);

(2) The fact that they were entitled to receive dividends on the life policy (Pet. Br. 5);

(3) The distinction between the instant situation wherein the life insurance could be surrendered without affecting the annuity payments and several situations in which continued receipt of annuity payments is dependent upon keeping the life insurance contract in effect. These other situations are set out both in the text and the footnote both hypothetically and by citation of cited cases with utter disregard of the significance of the "transfer" made in the instant case (Pet. Br. 13-14).

Petitioner apparently follows the technique of the court in the *Burr* case, discussed in detail later in this brief, which technique is epitomized in the following language from the *Burr* opinion (156 F. 2d 871):

> "The two purchases were obviously a single transaction, the annuity premium being part of the consideration for the insurance policies. Unless differentiated because of the subsequent assignment, therefore, the case is squarely within the Supreme Court's decision in *Helvering* v. *LeGierse*, 312 U. S. 531, 61 S. Ct. 646, 85 L. Ed. 996, holding the proceeds of the policies taxable under § 811 (c)."

It is submitted that petitioner has wholly misconceived the issue. The statute refers to property and interests in property, without particularly defining or limiting them, obviously intending the category to be all embracing. The statute makes no distinction as to what the type of property is, and it is submitted that the nature and character of the property is immaterial. The pertinent inquiry is: What did the decedent do with the property?

Respondents' position is that the decedent acquired certain property (and for the purpose of Section 811 (c)(1)(B) it makes no difference whether the property was or was not insurance, or by what name or designation it is described); that she gave away part of this property and kept part of it; and that she retained no interest in the part she gave away.

Respondents submit that it is immaterial whether the property originally acquired constituted one parcel of property or several, or whether it was acquired in one transaction or several, inasmuch as the property was certainly of a type which was susceptible of division, whatever its original character with reference to unity or integration may have been.

If a father desires to buy a quarter section of land from a neighboring farmer for the purpose of making a gift of it to his son, and he is unable to buy the quarter section without buying a complete half section of which it is a part, and he buys the half section and then gives the quarter section to his son without any strings attached and keeps the other quarter until his death, and farms and enjoys it and derives the income therefrom, it certainly cannot be contended that the quarter section given *inter vivos* to his son is includible in the estate at death by reason of the facts stated. If, on the other hand, the decedent, having purchased the half section, should then decide that he will

reserve unto himself a life interest in the entire half section, and should give only the remainder interest to his son, then obviously the entire half section is includible in decedent's estate at death under Section 811 (c)(1)(B).

Although in both instances the property was undoubtedly an integrated unit when purchased and was acquired in a single transaction, that matter is of no significance to the determination of the present question. It might become quite pertinent with reference to the allocation of cost basis for purposes of determining capital gains. The thing that is significant in determining applicability of Section 811 (c)(1)(B) is the character of the interest subsequently given and the character of the interest, if any, reserved.

The same considerations apply to an almost unlimited range of property and transactions, in which a person who desires to buy one item of property is required by the wishes of the seller to buy another item of property in an integrated transaction, and subsequently makes a complete unrestricted *inter vivos* gift of the item which he desired to buy, and retains the other item which he was required to buy. A homely example would arise in a situation where a man desires to buy a pony for his son from the owner who will not sell the pony, unless he can also sell the buggy used with it. The man buys the pony and buggy, makes an unrestricted gift of the pony to his son, and retains the buggy and makes such use of it as he can until his death. Certainly the petitioner would not contend that the value of the pony should be included in the decedent's estate.

Respondents will not unduly multiply examples, but offer merely one further situation which they deem closely analogous to the situation at bar.

A hypothetical corporation is willing to sell any amount of its preferred stock, but will only sell its common stock

to a purchaser who, at the same time, buys a specified amount of its preferred stock. (The analogy of the preferred and common stock to the annuity and life insurance policies respectively, is, of course, obvious.) A buyer enters into an agreement for the purchase of the required amount of preferred stock in order to obtain the common stock. He immediately thereafter makes an absolute, irrevocable, and immediate gift of the common stock to his son, including the entire income therefrom, but retains the preferred stock. Can it be seriously contended that because the donor, in order to secure the common stock, was required to purchase at the same time a given amount of preferred stock, he has, for that reason, retained an income for life in both the common and preferred stock so as to render the common stock includible and taxable in his gross estate at death? It is, of course, true that in determining and allocating the basis of the stock for purposes of capital gain, the Commissioner would have the right to treat the purchase as one entire contract, even after the transfer to the son, since his would be a substituted basis.

The analogy of the hypothetical situation to the instant case is apparent. In both the *LeGierse* case and in the case of the hypothetical situation, the court treats several transactions as an entire contract for a particular purpose, *i. e.*, in the *LeGierse* case, for the purpose of determining eligibility for the insurance deduction under 302 (g), and in the hypothetical situation, for determining the basis of the stock. However, it is not a necessary concomitant of this proposition that the two contracts must always continue to be one for every and all purposes, and that they cannot be severed by assignment of one of the contracts, as was done in the instant case. If the logic of the *Burr* case and of petitioner's contention, were applied to the hypothetical situation, the value of the common stock would be included in the gross estate.

III.

THE COURT OF APPEALS BELOW CORRECTLY HELD THAT THE ANNUITY PAYMENTS RECEIVED BY THE DECEDENT DID NOT CONSTITUTE INCOME FROM THE LIFE POLICY.

The Court below correctly rejected petitioner's contention that the annuity payments constituted income from the life policy, with the observation "that to state the proposition is to demonstrate its fallacy." (R. 57.) Petitioner's contention disregards the nature and character of the term "income" when that term is used as it is in the pertinent statute in conjunction with "property." In law and in general acceptance, the income from property is the money or property which grows from, is paid for the use of, or otherwise accrues from the property to which it is appurtenant. Profits or income constitute an integral part of the property itself. They are a fruit which grow upon the tree of property, and cease to grow when the tree dies or is destroyed. No concept is more firmly rooted in our law and tradition. *Pollack* v. *Farmer's Loan and Trust Co.*, 157 U. S. 429 (1895).[8] The Supreme Court has defined

8. In holding invalid certain provisions of an 1894 statute imposing an income tax, the court in the *Pollack* case gave exhaustive consideration to the nature of income from property and the relationship thereof to the property from which it was derived. Although the court divided on certain ultimate issues, no dissent was expressed from the proposition that the income from property is an integral part of the property itself. Typical of the many authorities to this effect, quoted with approval, are the following:

Coke upon Littleton: "If a man seized of lands in fee by his deed granteth to another the profit of those lands, to have and to hold to him and his heires, and maketh livery *secundum formam chartae*, the whole land itselfe, doth passe; for what is the land but the profits thereof?" Lib. 1, cap. 1, § 1, p. 4b. (157 U. S. 429, 580, 590.)

Jarman on Wills, Vol. 1, page 740: " * * * a devise of the rents and profits or of the income of land passes the land itself both at law and in equity; a rule, it is said, founded on the feudal law, according to which the whole beneficial interest in the land consisted in the right to take the rents and profits." (157 U. S. 429, 580, 589.)

income as "the gain derived from capital, from labor, or from both combined." *Eisner* v. *Macomber*, 252 U. S. 189 (1920). If there could be any doubt that the term "income" as used in Section 811 (c)(1)(B) contemplates and requires the continued existence of the property to which the income is applicable, such doubt would be immediately dispelled by the other language of the pertinent phrase, *i. e.*, "* * * the possession or enjoyment of, or the right to the income from, the property * * *."

Income in the sense here pertinent, is money received from the use of money or property. If Smith buys corporate stock, he receives income in the form of dividends so long as he holds the stock, but no longer. If Black lends money to White, he receives income in the form of interest so long as White has the use of his money, but no longer. If Smith sells his stock he ceases to receive income therefrom. When Black receives payment of his money, he stops getting interest. But, in the instant case, if the assignees of the life insurance contract had surrendered their contract a year after it was written and received the money invested, decedent would still have been entitled to receive her annuity payments right up to the day of her death. It would follow that the annuity payments did not constitute "income on the money invested in the life insurance contract."[9]

Petitioner's contention is predicated upon the unfounded assumption that the annuity income constitutes the sole income from the total premiums invested in both the life

9. Had they, however, surrendered the life insurance policy, assignees would have ceased to receive the dividends on that contract, and it would have ceased to appreciate in value. These are the elements of income on the life insurance policy, and they were received by and accrued to the benefit of assignees, and not to the decedent.

and annuity contracts. It is not. Actually there are four elements of income:

1. The annuity payments.
2. Dividends on the annuity contract.
3. The dividends on the life policy.
4. The increment in value of the life policy.[10]

Of these four elements of income, the first two were to be received and were received by the decedent; the last two were irrevocably assigned to the respondents and actually received by them.[11]

Actually the annuity payments constituted income only in part, and were comprised principally of repayments of capital. The insurance company required the purchase of the annuity contract as a condition to issuing the life insurance contract without examination. The converse is not true. The company, or any insurance company, would have been glad to issue the annuity contract alone without purchase of the life insurance contract. Physical examination is not required for the purchase of annuity policies, for the obvious reason that physical infirmity of the annuitant renders the contract more attractive to the company. The annuity contract was of the non-refundable type, *i. e.*, no guaranteed aggregate sum was to be paid, and all rights under the contract were to terminate at death no matter how soon that might have occurred. (R. 12, 13.) Hence, the theory of the policy is that part of each

10. This item of income rather than being paid periodically, accrues, after the nature of the accruals of income upon government E bonds, purchased at 75% of face value and redeemable upon demand at some percentage of face value between 75% and 100%, depending upon the time held. The policy itself sets forth the table of increasing surrender values (R. 25), in form, appearance, and computation not too dissimilar from the table appearing on the reverse side of government E bonds, and indicates the basis of computation of the income by way of accrual.

11. The dividends on the life policy were by the respondents reassigned to Virginia E. Bohnen, one of the respondents (R. 16).

payment represents refund of premium and the balance interest thereon, or income.

This is the theory upon which annuity payments are taxed for income tax purposes. Under Section 22 (b) (2) of the Code, annuity payments are treated as income to the extent of three per cent of the consideration or aggregate premiums, and the balance of the payments in excess of that amount are treated as return of capital or investment, until all capital has been recovered. The annuitant in the instant case lived less than seven years after purchase of the contract, and accordingly received only six annual payments. (R. 3, 12.) The allocation under Section 22 (b) (2) is as follows:

Date	Annuity Payments	Allocation		Principal Still to Be Received
	Amount	To Income*	Return of Principal	
				$22,602.96
Oct. 15, 1936....	$1,618.03	$ 678.09	$ 939.94	21,663.02
Oct. 15, 1937....	1,618.03	678.09	939.94	20,723.08
Oct. 15, 1938....	1,618.03	678.09	939.94	19,783.14
Oct. 15, 1939....	1,618.03	678.09	939.94	18,843.20
Oct. 15, 1940....	1,618.03	678.09	939.94	17,903.26
Oct. 15, 1941....	1,618.03	678.09	939.94	16,963.32**
	$9,708.18	$4,068.54	$5,639.64	

* 3% of Premium, *i. e.*, $22,602.96.

** Never recovered, except for such dividends as may have been received on the annuity policy. The record does not indicate the amount of such dividends; hence they cannot be used in the computation.

If petitioner were correct in his contention that the annuity payments constituted income on the total premiums paid for both policies, then under Section 22 (b) (2) three per cent of such total premiums should be treated as income. The Commissioner has asserted this theory in the courts, but without success.[12]

12. *Koehrer* v. *Commissioner*, C. C. H. Dec. 14,408 (M) (Tax Court Memorandum Decision, 1945), relying in part upon *Helvering* v. *Meredith*, 140 F. 2d 973 (C. C. A. 8, 1944). These cases are discussed in Section IV (5) of this brief.

The unsoundness of petitioner's contention that the annuity payments constituted income on both contracts may be tested by a further consideration. The total premiums paid amounted to $76,320, *i. e.*, $53,717.04 on the life policy, and $22,602.96 on the annuity contract. Total sums received from the company were $81,708.18, *i. e.*, $72,000 face value of the life policy and $9,708.18, total annuity payments. Hence total receipts exceeded total investment by $5,388.18. This would, upon petitioner's theory, constitute total "income" on the investment, and yet decedent received aggregate annuity payments of $9,708.18. It is thus clear that the annuity payments were not restricted to "income." Hence, they must have consisted of "income" and "principal." Since the annuity contract was and would have been issued independently of the life policy, and was so computed actuarily, it is clear that the annuity payments constituted income and principal on the annuity contract above.[13]

IV.

THE CASE OF BURR v. COMMISSIONER, 156 F. 2d 871, WAS ERRONEOUSLY DECIDED, AS WERE ESTATE OF REYNOLDS v. COMMISSIONER, 45 B. T. A. 44, WHICH PRECEDED IT, AND CONWAY v. GLENN, 139 F. 2d 965, WHICH FOLLOWED IT.

It should be noted at the outset that the Court of Appeals for the Second Circuit, with two of the same judges participating who decided the *Burr* case, has recently rendered a decision which casts grave doubt on the reasoning of the *Burr* case. In *Commissioner* v. *Twogood's Estate*,

13. It is true that dividends were paid both on the annuity contract and on the life policy, the former to decedent, the latter to the assignees and owners of the life policy. Such dividends were, however, independent of the actuarial computations. Anyway, the dividends on the life policy would obviously exceed those on the annuity policy because of the higher premium reserve, and face value of the life policy (R. 14, 15, 23, 25).

194 F. 2d 627 (C. A. 2d, 1952), the decedent had been the beneficiary of a company retirement plan under which he could, and did, elect to reduce the annual payments to be received by him in order to provide for the payment of an annuity to his wife after his death. The Commissioner added to the value of the decendant's gross estate an amount equal to the value at the decendent's death of the annuity payable to his wife. In the Court of Appeals the Commissioner's sole contention was that the value of the annuity payable to the decedent's wife was includible in his gross estate on the theory that he had made a transfer of property under which he retained for his life the possession or enjoyment of, or the right to, the income from the property. The Court rejected the Commissioner's contention, and held that no life interest was retained by the decedent in what his wife received by his election under the plan. The Court said that to meet the requirements for includibility in the decedent's estate under Section 811 (c)(1)(B) "there must be some causal relationship between the property transferred and the payments received by the transferor * * *." (194 F. 2d at 629.) It is difficult to understand how the same court which failed to find such a causal relationship in the *Twogood* case, could have believed that there was one in the *Burr* case.

It is submitted that the erroneous decision reached in the *Burr* case (and in the other two cases cited) resulted from the following principal errors and misconceptions:

(1) The Court misconceived the holding and scope of *Helvering* v. *LeGierse*, 312 U. S. 531, and subordinated substance to form.

(2) The Court focused attention upon the relationship between the decedent and a third party, *i. e.*, the insurance company, to the exclusion of the determinative and significant relationship between the decedent and the transferee.

(3) The Court misconceived the factual situation of, holdings in, and significance of *Commissioner* v. *Clise*, 122 F. 2d 998 (C. A. 9, 1941) and *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281 (C. A. 5, 1941).

(4) The Court ignored the distinction between transfers "intended to take effect in possession at or after his death" and "transfers under which he has retained for his life * * * the possession or enjoyment of or the right to the income from the property," and disregarded also the theory and purpose of imposing an estate tax upon *inter vivos* transfers.

(5) The Court erred in concluding that the annuity payments constituted the income from the combined premiums.

(1) In Burr v. Commissioner, 156 F. 2d 871, the Court Misconceived the Holding and Scope of Helvering v. LeGierse, 312 U. S. 531, and Subordinated Substance to Form.

In the *LeGierse* case the decedent had purchased both an annuity and life insurance policy on her own life, naming her daughter as beneficiary. Decedent was eighty years old at the time, and the life insurance policy would not have been issued, but for the purchase of the annuity contract. All rights of ownership, in both the annuity contract and the life insurance policy, were retained by the decedent until the time of her death.

The court held that the life insurance policy did not constitute insurance within the purview of Section 302 (g)[14] so as to entitle the estate to the $40,000 deduction

14. Prior to amendment in 1942, Sec. 811 (g), formerly 302 (g) read as follows:

"(g) Proceeds of Life Insurance.—To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

for insurance therein provided; and that the proceeds of the insurance policy were "taxable under Section 302 (c) of the Revenue Act of 1926 as amended as a transfer to take effect in possession or enjoyment at or after death."

In the *Burr* case the essential factual situation was the same as in the *LeGierse* case, except that the decedent, subsequent to purchase thereof, assigned ownership of the life policies (here there were several policies) to his sons. The Second Circuit Court of Appeals held that upon the death of the decedent, the proceeds of the insurance policies transferred *inter vivos* constituted "transferring a remainder while retaining a life interest—or in the terms of the statute—retaining the enjoyment or the right to the income from the property."

The court's position in the *Burr* case would seem to be that in the *LeGierse* case, the Supreme Court has laid down the broad proposition that in any annuity-single premium life insurance policy situation where decedent has paid the premiums, the proceeds of the life policy are *ipso facto* includible in decedent's estate, irrespective of what decedent may have done subsequently with the life policy. The following language is pertinent (p. 871):

> "The two purchases were obviously a single transaction, the annuity premium being part of the consideration for the insurance policies. Unless differentiated because of the subsequent assignment, therefore, the case is squarely within the Supreme Court's decision in *Helvering* v. *LeGierse*, 312 U. S. 531, 61 S. Ct. 646, 85 L. Ed. 996, holding the proceeds of the policies taxable under § 811 (c)."

The *LeGierse* case does not support this proposition at all. In that case, the taxpayer never seriously denied that the proceeds of the life insurance policy were includible in the gross estate "as a transfer to take effect in possession or enjoyment at or after death." Certainly, he

could not seriously have taken such a position in view of the fact that the beneficiary acquired no right, title or interest whatever in the policy or its proceeds until the death of the insured. The only real question before the court was as to whether or not the life insurance policy constituted "insurance" within the purview of Section 302 (g). The Court held only that the two contracts as written and as they remained throughout the life of the decedent (no change in their status having ever been made) constituted one contract, did not involve an "insurance risk," and did not qualify for the special statutory deduction in Section 302 (g). The court itself states the issue of the case at follows (p. 538): "Thus the basic question is whether the amounts received here are amounts 'receivable as insurance' within the meaning of § 302 (g)."

(2) In Burr v. Commissioner, 156 F. 2d 871, the Court Focused Attention Upon the Relationship Between the Decedent and a Third Party, i. e., the Insurance Company, to the Exclusion of the Determinative and Significant Relationship Between the Decedent and the Transferee.

It is believed that the treatment accorded by the court in the *Burr* case to the relationship between the three parties, *i. e.*, the decedent, the transferee, and the insurance company, is deserving of comment and is indicative of a misconception on the part of the court regarding the ultimate problem. The following language from the opinion is deemed pertinent:

> "When the decedent in this case transferred $107,500 to the insurance company, he obtained from it two promises: one to pay him a small rate of return in the form of monthly annuity payments, the other to transfer $100,000 to the named beneficiaries on his death. His annuity payments represented a fixed per-

centage of the total consideration; and the company investment risk was so calculated as never to exceed the expected income from the premiums on the insurance and the annuities. * * *

"Had the sons actually cashed the insurance policies, the contracts would have been separated and the insurance company would then have had to make annuity payments out of income and capital from the annuity premium. See Meisenholder, Taxation of Annuity Contracts under Estate and Inheritance Taxes, 29 Mich. L. Rev. 856, 884; 42 Col. L. Rev. 162, 165. But they chose not to surrender them; and the unexercised power to do so did not change the factual realities of the transaction. While the power was unexercised, the investment was analogous to a simple annuity with principal payable at death, a transfer which—even when irrevocable—is taxable under § 811 (c). *C. I. R.* v. *Wilder's Estate*, 5 Cir., 118 F. 2d 281, certiorari denied *Wilder's Estate* v. *C. I. R.*, 314 U. S. 634, 62 S. Ct. 67, 86 L. Ed. 509." [156 F. 2d 871, 872.]

Apparently the court's attitude is that if the transferees had surrendered the life insurance policy, and collected the cash surrender value, then no sums would have been taxable to or included in the gross estate of the decedent by virtue of the original transfer; this despite the fact that such surrender of the policy would neither have affected the relationship between the decedent and the insurance company, nor that between the decedent and the transferee. The only relationship which possibly could have been affected would have been that between the transferee and the insurance company.

The language of Section 811 (c) upon which the court predicates liability refers to a transfer of property in which the decedent has reserved the income for life. It is extremely difficult to see how a subsequent transaction between the transferee and a third party, the insurance company, after a complete and irrevocable assignment of

the policy to the beneficiary, with no reversionary or other interest of any type reserved to the decedent, can possibly affect the question of whether or not the decedent has reserved income for life.

It must be remembered that the basis for asserted liability is that the annuity payments constitute the "income" upon both policies since the decedent made no further transactions after the irrevocable assignment of the life insurance policy, and did nothing further whatever to change the status of the contracts, or of his rights. It would seem that he either had or had not reserved the income on the life insurance policy at the time the irrevocable assignment was made.

The reason the court has assumed an illogical position on this point is that it has started out with a highly untenable premise. The obviously untenable premise is that the decedent has retained the income from a contract when he has in fact made a complete assignment of that contract without any reservation of rights whatever.

Recalling the court's attention to the hypothetical situation set forth above,[15] it would seem equally logical to hold that the value of the common stock transferred to decedent's son should be included in decedent's gross estate, if his son retained the stock at the time of decedent's death, but otherwise, if the son resold the stock prior to decedent's death. Certainly it is difficult to believe that it was the intention of Congress or of the Supreme Court that taxability should hinge upon such highly artificial and irrelevant considerations.

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15. *I. e.*, the purchase in a single transaction of preferred stock as a condition to purchase of common stock, and subsequent gift of the common stock to decedent's son (Section I of Argument).

(3) In Burr v. Commissioner, 156 F. 2d 871, the Court Misconceived the Factual Situation of, Holdings in, and Significance of Commissioner v. Clise, 122 F. 2d 998 (C. A. 9, 1941) and Commissioner v. Wilder's Estate, 118 F. 2d 281 (C. A. 5, 1941).

In the *Burr* case the court apparently rested its decision upon the authority of the *Clise* and *Wilder's* cases. These cases seem to the respondents to have been correctly decided, but not to support the *Burr* case, because they involve an entirely different problem. In the *Clise* case, two types of problems were presented: one with reference to the purchase of life and annuity policies; the other with reference to joint and survivor annuity contracts.

The first problem involved policies of the type of the instant case, except that in the *Clise* case the annuity and life policies were retained by the decedent throughout her lifetime. The court held on the authority of the *LeGierse* case, that the proceeds of the policies were includible in the gross estate under Section 302 (c) of the Revenue Act of 1926. That portion of the case was substantially identical with the situation of the *LeGierse* case, and certainly the court could have reached no other conclusion. The real controversy in the case dealt with the other policies involved.

In each of sixteen joint and survivor annuity contracts decedent had named herself as primary annuitant, and some other person as a second annuitant to receive the annuity after her death, and until the second annuitant's death. The question with reference to these contracts was simply whether or not their value at the time of decedent's death should be included in her gross estate under Section 302 (c). It is interesting to note that in the determination of this question, the court made no reference whatever to the *LeGierse* case, despite the fact that the court had relied

upon it in connection with the annuity-life policy problem. This is quite significant, indicating as it does a proposition which should be self-evident, *i. e.*, that the *LeGierse* case is applicable only to the question of whether or not a single contract exists with reference to Section 302 (g), and not with reference to the includibility of the proceeds of a policy under Section 302 (c) (now 811 (c).) The court held that the value of the policies at the time of death was includible in the gross estate, and predicated liability squarely upon the joint resolution of March 3, 1931.[16] The following language is particularly pertinent (p. 1003):

> "Unquestionably, Mrs. Clise, the first annuitant, reserved to herself the enjoyment—the economic benefit, of these contracts, during her lifetime. This is true, just as surely as though she had created a trust fund with her property—money, and reserved to herself a certain sum annually, to be paid out of income and corpus, with the remainder over. Mrs. Clise reserved to herself the complete enjoyment of her property, during her lifetime, to the extent she desired to enjoy it, relieved of the worry and cares of management, and guaranteed an estate to the objects of her bounty after her death. It is clear, therefore, that Mrs. Clise retained to herself the economic benefits of her property during her lifetime."

It may be assumed that in the *Clise* case, the rights of the second annuitant were vested, and that the decedent could not have defeated those rights by surrender of the policy, and certainly not by designating another secondary annui-

16. Following the holding in *May* v. *Heiner*, 281 U. S. 238 (1930), and other decisions cited below, holding the existing statute inapplicable to transfers with reserved life interests, the joint resolution of March 3, 1931 added to Section 302 (c) now 811 (c), the following language:

> "including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income thereof;"

tant, since the premium was determined by reference to the ages of the two annuitants. However, the situation presented there was clearly one where the decedent had reserved the life income from the very property in question. There not only was only a single contract originally, but there was not and could not have been a division of that contract, or any way in which the policy or any part or share of it could have been surrendered without interfering with or obliterating the life interest and enjoyment of the decedent. Attention is invited to the court's own language (p. 1003):

> "* * * so long as Mrs. Clise lived, it was impossible for the second annuitants to possess or enjoy the economic benefits of the transfer and until Mrs. Clise's death it was not an absolute certainty that any one of the second annuitants would survive her. The death of the first annuitant, then, was the generating event."

This situation truly fits into the intendment of the clauses of Section 811 (c) dealing with a transfer in which the decedent has reserved the income for life. Certainly this is not the situation of the instant case wherein the transferees could have surrendered and realized upon the value of their contract without in any way interfering with the enjoyment of the income of the decedent.

The *Wilder's Estate* case was substantially identical in all particulars with the joint and survivor annuity situation in the *Clise* case. Although the court was somewhat indefinite as to which clause of Section 811 (c) liability should be predicated upon, it seemed to incline toward the clause concerning transfers "in contemplation of, or intended to take effect in possession or enjoyment at or after his death."

(4) In Burr v. Commissioner, 156 F. 2d 871, the Court Ignored the Distinction Between Transfers "Intended to Take Effect in Possession At or After His Death" and "Transfers Under Which He Has Retained for His Life * * * the Possession or Enjoyment of or the Right to the Income from the Property," and Disregarded Also the Theory and Purpose of Imposing an Estate Tax Upon Inter Vivos Transfers.

The court's misconception of the scope and holding of the *LeGierse* case affected its entire approach to the problem. It assumed that it was dealing merely with a minor variation of a situation already adjudicated in the *LeGierse* case, *i. e.*, "unless differentiated because of the subsequent assignment." This is a curious approach when dealing with a statute the gist of which is the assignment, or "transfer," particularly when one recalls that in *LeGierse*, the taxpayer conceded that the proceeds of the insurance policy were includible, and was merely asking for a deduction therefrom under Section 302 (g). In the *Burr* case, the question of includibility was the ultimate problem.

In the *LeGierse* case includibility was concededly predicated upon the theory of a transfer taking effect in possession or enjoyment at death. The clause dealing with *inter vivos* transfers in which an interest is reserved was obviously inapplicable, since in that case no transfer had ever been made.[17]

17. In *Commissioner* v. *Clise*, 122 F. 2d 998, liability was predicated upon the latter clause, *i. e.*, transfer (the irrevocable designation of the second annuitant) with a reservation of income (the annuity payments). In *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281, the court was somewhat undecided, apparently feeling that the facts could be brought under either clause, but inclining toward the former, *i. e.*, a gift to take effect in possession or enjoyment at death. In the *Burr* case, however, the court, although ostensibly following the *LeGierse* case, predicated liability upon a different clause entirely from that applicable to the *LeGierse* case, without any apparent recognition of the fact that it had shifted

It is believed that the failure of the court to recognize the distinctive character of these two types of clauses is indicative of its superficial treatment of the entire problem of includibility. Further evidence of such superficiality is the following observation of the court (156 F. 2d 871, 872):

> "While the power [to surrender the life policy] was unexercised, the investment was analogous to a simple annuity with principal payable at death, a transfer which—even when irrevocable—is taxable under § 811 (c)."

A moment's reflection indicates the fallacy of such a con-

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the statutory basis for its holding and without one word of explanation therefor.

A sharp distinction has been recognized between these two types of clauses by both the Supreme Court and Congress, since the holding in *May* v. *Heiner*, 281 U. S. 238 (1930), that property transferred *inter vivos* with a reserved life estate was not includible as a transfer intended to take effect at death. Subsequent to that decision, the latter clause was introduced by the Joint Resolution of March 3, 1931, and further clarified and expanded under the Revenue Act of 1932. The Joint Resolution added to Section 302 (c), now 811 (c), the following language: "including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income thereof; * * *." The language of the Joint Resolution of March 3, 1931 was revised by Section 803 (a) of the Revenue Act of 1932 to read as follows: "or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; * * *."

The added clauses were subsequently held to be prospective only in their operation. *Hassett* v. *Welch*, 303 U. S. 302 (1938). The cycle has now apparently been closed by the decision in *Commissioner* v. *Church's Estate*, 335 U. S. 632 (1949), in which the Supreme Court repudiated *May* v. *Heiner*. For the period between the date of the Joint Resolution of March 3, 1931, and the decision in the *Church* case, however, the separate character and operation of the two clauses was recognized, and it was, of course, within that period that all of the facts of the instant case arose.

clusion in view of the fact that under a "simple annuity", the annuitant is unable to collect the principal from the insurance company and still continue to receive the annuity payments, whereas in the instant situation collection of the cash surrender value of the life policy would not affect the annuity policy in the slightest.

It would seem clear that the dominant purpose of the statutory provisions of 811 (c), as well as those of 811 (d) (dealing with revocable trusts) is to prevent avoidance of the estate tax. *Paul, Federal Estate and Gift Taxation,* § 7.04 and cases cited therein. Under relevant provisions of 811 (c), in order for a transfer to be taxable, the transfer must either be a substitution for a testamentary disposition, or death must bring about a shift in economic interest. *Op. cit.* § 7.05 and authorities cited. The following language of Mr. Justice Frankfurter, used with reference to a state inheritance tax matter, in *Whitney* v. *Tax Commission,* 309 U. S. 530, 538 (1940), is illustrative:

> "In making this diversion ['to the purposes of the community of a portion of the total current of wealth released by death'] the state is not confined to that kind of wealth which was, in colloquial language, 'owned' by a decedent before death, nor even to that over which he had an unrestricted power of testamentary disposition. It is enough that one person acquires economic interests in property through the death of another person, even though such acquisition is in part the automatic consequence of death or related to the decedent merely because of his power to designate to whom and in what proportions among a restricted class the benefits shall fall.
>
> "The books are replete with recognition of these general principles. Thus the full value of property may be taxed as part of a decedent's gross estate even though held by him merely as a tenant by the entirety, *Tyler* v. *United States,* 281 U. S. 497; likewise the full value of property in which the decedent was only a

joint tenant may be taxed in his estate, *United States* v. *Jacobs*, 306 U. S. 363. In neither of these instances was there an exact equation between the 'beneficial interest' owned by the decedent just before his death and that by which the tax was measured. Again, this Court found no difficulty in sustaining a tax on the transfer of property conveyed in trust by a decedent during his life, although he had divested himself of all beneficial interest in the corpus and had only reserved the power to change the beneficiaries excluding, however, himself and his estate from the range of choice. *Porter* v. *Commissioner*, 288 U. S. 436. The attempt to differentiate the tie that binds these cases by treating the *inter vivos* transfers in these decisions as mere substitutions for testamentary dispositions, disregards the emphasis in these cases on the practical effect of death in bringing about a shift in economic interest, and the power of the legislature to fasten on that shift as the occasion for a tax. This broader base is emphasized, for instance, by the fact that in the *Porter* case the decedent had divested himself of all 'beneficial interest' in the trust property prior to the passage of the taxing act by which the trust was included in the value of his gross estate."

It may be said in general that all of the transfers referred to in the relevant provisions of Section 811 (c), except those involving the reservation of a life interest or income, are taxable on the theory of a shifting of economic interest by death.

Transfers made includible because of the reservation of a life interest or income in the decedent, are taxable as a substitute for a testamentary disposition. It becomes quite pertinent to inquire why transfers under this clause are deemed of a testamentary character. It would seem that all such transfers have the following elements in common, *i. e.*, that the transferor desires to place his property in a position where the transferee will have the ownership, possession and enjoyment of the property upon his death, but neverthe-

less wants to continue to have the use of the property during his life. Accordingly, in each instance the transferor has made some special arrangement with reference to the property transferred under which the freedom of the transferee in dealing with the property has for all practical purposes been substantially circumscribed and limited. Thus, for example, although from a technical property point of view, a remainderman can sell real estate which is subject to a reserved life estate, practically there is no market for such real estate at a price even approximating the actual value thereof. In the case of personalty, such arrangement usually takes the form of a trust, and here again even in the absence of a spendthrift provision, although technically the beneficiary can sell and assign his interest, there is practically no market for such interests.[18] These basic elements may be summarized as follows:

(a) Transferee has received irrevocable interest *inter vivos*.

(b) Transferee will come into enjoyment of property after transferor's death.

(c) Transferor will have enjoyment until his death.

(d) Transferee's enjoyment is postponed until death of transferor for the purpose of enabling transferor to retain enjoyment until his death.

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18. The absence of a market for such remainder interests is not only a matter of common knowledge, but has been judicially recognized, *e. g.*, *Mechling* v. *Meyers*, 284 Ill. 484 (1918), in which the Illinois Supreme Court gave the Illinois partition statute an admittedly strained construction in order to obviate partition of a remainder interest. The court said (p. 490):

"If the statute is to be construed as giving a right to compel a sale of a remainder after a life estate, where a purchaser cannot know whether he will get possession of his property in his lifetime or not and the interests of other owners will be sacrificed, a speculator may obtain for a trifling consideration the interest of a needy remainder-man, file a bill for partition of property that cannot be partitioned and practically destroy the other interests. Every sentiment of right and justice rebels against a construction of the statute which would permit such a result."

(c) The arrangement or device employed of necessity so entails the property transferred that transferee is precluded from dealing with it for his own benefit, prior to the death of the transferor.

How does the transfer of the insurance policy in the instant suit stand in the light of such tests? It is undisputed that the assignees of the insurance policy had a ready market for their property at any time by the simple device of surrendering the same to the insurance company at a price commensurate with its then value based mathematically upon investment and actuarial principles.

Was the arrangement made for the purpose of enabling transferor to retain benefits during his life? The only possible benefit reserved to the transferor upon the court's theory was the annuity payments which he was to receive upon the annuity contract. While it is true that the life insurance policy would not be sold without the annuity policy, the converse concededly is not true. The insurance company, or any other company, would have been happy to sell the decedent the annuity policy upon the same terms and yielding the same income for the same premium and thereby securing to the decedent the same benefits, without requiring the purchase of life insurance.

If the petitioner contends that the elements which we have cited as being common to all cases falling within this clause of 811 (c) are not present, then it would seem incumbent upon the government to point out to the court cases where the clause has been applied where such elements have not characterized the facts. We are confident that there are no such cases, other than the erroneous cases here complained of dealing with the present situation.

It is true that many arrangements are entered into where the immediate enjoyment of all or a part of the transferred property is withheld from the beneficiary, where these ele-

ments are not present, as in the case of the creation of many trusts in which no life interest or reversionary interest is reserved to the settlor. In these cases, however, the property is entailed for the protection of the beneficiary, and not for that of the transferor, and in such cases the disposition is not deemed testamentary and the property is not includible under 811 (c).

The fact cannot be too strongly emphasized that the transfer in the instant case falls within neither the letter, the spirit, nor the purpose of Section 811 (c). The transfer was of a life insurance policy. No income was reserved from this policy. The only income resulting from this policy were the dividends provided for therein, and the right to the appreciation in the value thereof, the right to receive both of which was specifically assigned with the policy. There was no "shift of economic interest" by reason of or at the death of decedent, since all such interest had passed irrevocably to the transferees at the time the policy was assigned. There was no entailment of this policy in any way for the benefit of the decedent, nor did the decedent have any "string" by way of possibility of reverter or otherwise on this policy.

(5) In Burr v. Commissioner, 156 F. 2d 871, the Court Erred in Concluding That the Annuity Payments Constituted the Income from the Combined Premiums.

In the *Burr* case the court used the following language (p. 872):

> "When the decedent in this case transferred $107,500 to the insurance company, he obtained from it two promises: one to pay him a small rate of return in the form of monthly annuity payments, the other to transfer $100,000 to the named beneficiaries on his death. His annuity payments represented a fixed percentage of the total consideration; and the company's

> investment risk was so calculated as never to exceed the expected income from the premiums on the insurance and the annuities. See *C.I.R.* v. *Keller's Estate, supra,* 3 Cir., 113 F. 2d 833, 834, 836."

Apparently the court concludes that since the "annuity" payments represented a fixed percentage of the total consideration, the total consideration being the premiums for both policies, it necessarily follows that the annuity payments constitute income upon both policies.

This is a curiously illogical conclusion. The annuity payments are all alike, and the amount of the total consideration is necessarily liquidated. Since identical payments must always constitute a "fixed percentage" of any liquidated amount, such mathematical phenomena can hardly be determinative of the instant problem. The annuity payments also constituted a "fixed percentage" of the consideration for the annuity alone, or, for that matter, of the national debt on the day the *Burr* case was decided.

In *Commissioner* v. *Keller's Estate,* 113 F. 2d 833 (1940), cited as authority in the above quotation, the court, having a case identical with the *LeGierse* case made a careful consideration of the underwriting factors underlying life insurance and annuity policies and concluded that the use of the device employed in the *LeGierse* case, and in the instant case, *i. e.,* of the insurance company protecting itself against the hazard of uninsurability by requiring an annuity policy in a specific minimum amount, did convert what would otherwise have been an insurance risk into an investment risk. The court even set forth in an appendix actuarial formulae demonstrating its conclusion. In the *Keller* case, however, there was no such conclusion reached as that reached in the *Burr* case upon the supposed authority of the *Keller* case. The misconception of the *Keller* case by the court in the *Burr* case is part and parcel of

its general misconception of the scope and holding of the *LeGierse* case.

Let us examine briefly the conclusion reached by the court in the *Burr* case, *i. e.*, that the annuity payments constituted income from both policies. Let us assume, as the court does, that the total consideration, *i. e.*, the premiums for both policies constitutes one lump sum. Consonant with the court's major premise based on the *LeGierse* case, the arrangement does not constitute insurance, but "investment." As indicated in Section I of this brief, the income which the insurance company agreed to pay upon this aggregate investment is not limited to the annuity payments, but is made up of three separate elements: (1) The annuity payments, (2) dividends upon the life insurance policy, and (3) proportionate increase in the value of the life insurance policy as the life expectancy is gradually exhausted.[19] In both the *Burr* case and the instant case, it is conceded that the dividends payable on the life insurance policy were covered by the assignment to the beneficiaries and payable to and received by them.

A study of actuarial formulae and principles (even to the extent that they are set out in the appendix referred to in the *Keller* case) will indicate that the income existing in the form of increase in value of the cash surrender value of a life policy is equal to the aggregate amount of the annuity payments. This is precisely the reason that the courts have held that such an arrangement does not constitute insurance but an investment risk.

Of the four types of income payable on the original aggregate consideration, it is obvious that in the *Burr* case and in the instant case, only the first two types, *i. e.*, the annuity payments, and the dividends on the annuity policy

19. Analogous to government "E" bonds, purchased at $75, worth $100 at maturity, and gradually increasing in value during the ten year period preceding maturity.

The petitioner seems to have taken this position unsuccessfully in *Koehrer* v. *Commissioner,* C. C. H. Dec. 14,408 (M) (Tax Court Memorandum Decision, 1945), by assessing a deficiency against an annuitant who had reported annuity income in the usual manner and asserting that the full amount of annuity income was reportable. In this case the taxpayer, the annuitant, had purchased two sets of single premium life insurance policies and annuity policies. He paid the following premiums on these policies:

Life Policy	Annuity Policy	Total Premiums
$39,296.50	$13,703.50	$53,000
7,984.70	2,515.30	10,500

During each of the two taxable years involved, the taxpayer received $1,249.80 in income from one policy, and $232.44 from the other, or a total income from these sources of $1,482.24. He reported as income from these sources for each year the sum of $486.56, computed as three per cent of the total annuity premiums of $13,703.50 and $2,515.30. In assessing a deficiency, the government included the total sum of $1,482.24 in the taxpayer's income for each year. Although the basis for the government's action was not made clear, it would seem to have been that the annuity income was reportable in full because it was less than $1,905.00, which is three per cent of $63,500, the total life insurance and annuity premiums. The court upheld the taxpayer, relying in part on *Helvering* v. *Meredith,* 140 F. 2d 973 (C. C. A. 8, 1944) which affirmed the decision of the Tax Court in *Meredith* v. *Commissioner,* C. C. H. Dec. 13,097 (M) (Tax Court Memorandum Decision, 1943). In the *Meredith* case the government had asserted that single premium life insurance policies and annuity contracts, when purchased together, constitute a single investment for the purpose of taxing as ordinary income to the in-

sured both the total annual payments to her from the annuity contract and the dividends paid to her on the life insurance policies. The court held that the transaction constituted the purchase of two separate contracts, the annuity payments being taxed according to the usual rule, and the dividends on the life policies being non-taxable until they exceed the aggregate premiums paid thereon.

It is submitted that the observations in this subparagraph set forth demonstrate further that the position reached in the *Burr* case and asserted by the petitioner in the instant case, is not only a sharp deviation from the applicable statute and cases, but is not consonant with treasury regulations and practice.

V.

THE ESTATE TAX REGULATIONS WITH REFERENCE TO APPORTIONMENT SUPPORT THE DECISION OF THE COURT OF APPEALS BELOW.

In his brief (Pet. Br. 5, 22, and 23) petitioner refers to an argument made by respondents below in connection with the provisions of Section 81.18 of the Estate Tax Regulations, 105, which, referring to and implementing Section 811 (c), provide in pertinent part as follows:

> "If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate."

Petitioner apparently misunderstands this argument, and assumes that respondents were asking the court below to make an apportionment in accordance with those provisions, and indicates to the court that respondents are thus asking for relief upon an issue not properly before the

court, because the facts necessary to such apportionment do not appear in the record. This was not the object of the argument at all. Respondents referred, and now refer, to the quoted section of the Regulations for the purpose of indicating that the application of such section leads to precisely the results already reached in the courts below. The facts pertinent to this argument are in the record.

In the instant case the apportionment referred to in the Regulations has already been made. The apportionment was specified in the contracts themselves, upon mathematical and actuarial principles of general use and acceptation, principles which the petitioner has not and cannot assail, and which would be accepted in any litigation regarding such question of apportionment. Under this apportionment, the annuity payments, together with the dividends on the annuity policy, include all of the income allocable to the annuity premium, whereas the dividends on the life insurance policy, together with the appreciation in value thereof, constitute the income upon the life insurance premium. Hence, it is clear that application of Section 81.18 of the Regulations leads to precisely the result reached in the courts below, namely, that decedent reserved no income with reference to the life insurance policy, and that no portion of the proceeds of such policy are includible under Section 811 (c)(1)(B).

This argument was made below and is restated here, as well as the argument based upon Section 22 (b)(2) of the Internal Revenue Code[20] for the purpose also of demonstrating that the position of the petitioner is in conflict with other provisions of the statute and regulations, and with common practice pertaining thereto.

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20. Discussed at length in the last preceding section of the brief, *i. e.*, Section IV (5).

CONCLUSION.

As applied to the instant case, the meaning of Section 811 (c)(1)(B) is clear. That section was designed to prevent tax avoidance. The instant case falls within neither the letter nor the spirit of its language. The attempt of the petitioner to bring the facts of the instant case within the intendment of that language is neither realistic nor logical. The cases have enunciated a mandate subordinating form to substance and prohibiting consideration of artificial or technical devices of conveyancing with regard to that section. *Helvering* v. *Hallock*, 309 U. S. 106 (1940). Certainly the Supreme Court intended the government as well as the taxpayer to be bound by that same mandate.

It is respectfully requested that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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APPENDIX.

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * *

(c) [as amended by Section 7 (a) of the Act of October 25, 1949, c. 720, 63 Stat. 891] *Transfers in Contemplation of, or Taking Effect at, Death*—

(1) *General Rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

* * *

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; or

(C) intended to take effect in possession or enjoyment at or after his death.

* * *

(26 U. S. C. 1946, ed., Supp. III, Sec. 811.)

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 566

CARTER H. HARRISON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

EDWIN J. BOHNEN, EXECUTOR OF THE ESTATE OF MARY A. BOHNEN, AND INDIVIDUALLY; THEODORE G. BOHNEN AND VIRGINIA E. BOHNEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 33-38) is reported at 100 F. Supp. 118. The opinion (R. 55-57) and dissenting opinion (R. 58-59) of the Court of Appeals are reported at 199 F. 2d 492.

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1952. (R. 60.) The petition

for a writ of certiorari was filed on January 26, 1953, and was granted on March 9, 1953 (R. 63). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

The decedent purchased a single-premium annuity contract and a single-premium life insurance policy in 1935. The life insurance policy was issued without physical examination and would not have been issued to the decedent except in conjunction with the purchase of the annuity contract. She assigned the life insurance policy to her children and received the annuity payments until her death.

The question is whether the decedent made a transfer of property in which she retained the right to the income for her life or for a period which did not in fact end before her death, so that the insurance proceeds would be includible in her gross estate under Section 811 (c)(1)(B) of the Internal Revenue Code.

STATUTE INVOLVED

The application provisions of the statute involved are set forth in the Appendix, *infra*, p. 24.

STATEMENT

The judgment of the District Court in this case was entered by granting the taxpayers' motion for judgment on the pleadings. (R. 42.) The pleaded facts may be summarized as follows:

On October 25, 1935, the decedent, who was then 62 years old, purchased a life insurance policy, in

the face amount of $72,000, for a single premium of $53,717.04. On the same day, she purchased an annuity contract, which provided for annual payments to her until death of $1,618.03, for a single premium of $22,602.96. The insurance company required that the annuity contract be purchased as a condition of issuing the life policy, which required no physical examination. (R. 7-8, 33.)

The life policy named the decedent's children as primary beneficiaries. She also assigned the policy to them jointly, transferring all her right, title and interest. This carried with it, among other things, the right to receive the cash surrender value, if the children so elected, and the right to receive the dividends payable thereon. The decedent filed a gift-tax return, reporting as gifts to her children a one-third interest for each in the life insurance policy. The decedent died on June 23, 1942. (R. 33.)

A deficiency in estate tax was determined due to the failure to include in the decedent's gross estate the proceeds of the life insurance policy which were payable after her death. The deficiency was paid, a claim for refund was filed and denied, and this action to recover the asserted overpayment was filed. (R. 4, 33-34.)

The District Court, granting the taxpayers' motion for judgment on the pleadings, held that the proceeds of the life insurance policy were not properly includible in the decedent's gross estate. (R. 33-38.) The Court of Appeals affirmed, one judge dissenting. (R. 55-59.)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred in holding that the decedent, who purchased a single-premium life insurance policy without medical examination on condition that she purchase a single-premium annuity contract, and who assigned the life policy to the beneficiaries thereof, but received the annuity payments for her life, did not make a transfer of property in which she retained the income for life, and in failing to hold that the proceeds of the life policy paid after death were includible in her gross estate under Section 811 (c)(1)(B) of the Internal Revenue Code.

SUMMARY OF ARGUMENT

When the decedent was issued a single-premium life insurance policy without a medical examination on condition that she purchase a single-premium annuity contract, the combination of contracts removed any elements of life insurance and resulted in a simple investment with the insurance company. Although separate contracts were written, the fact that the life policy would not have been issued except on condition that the annuity contract be purchased shows that the transaction was an integrated one having no different taxable consequences than if the terms of the two contracts had been embodied in a single document. *Helvering* v. *Le Gierse*, 312 U. S. 531.

The essence of the transaction was that the decedent invested a sum with the insurance company,

consisting of the net amount of the premiums, she became entitled to the income from the investment in the form of annual payments for the period of her life, and her children, to whom she had assigned the life policy, received the principal amount at her death. Such a transfer, whereby the decedent received the income from the property for the period of her life and the transferees received the property at her death, is includible in the decedent's taxable gross estate under the express provisions of Section 811 (c)(1)(B) of the Internal Revenue Code.

It is not material that the children could have received a smaller cash surrender value during the decedent's lifetime by surrendering the life policy. The statute, looking to the situation that actually exists at the decedent's death, taxes the transfer if the decedent's retained interest did not in fact end before death. Accordingly, since the life policy was not surrendered during her lifetime, since she continued to receive the income payments until death, and since the children received the full principal sum after her death, Section 811 (c)(1)(B) is applicable.

The fact that the children could have received dividends on the life policy does not alter the integrated nature of the transaction. *Goldstone* v. *United States*, 325 U.S. 687. And the contention that if the decedent and the children had actually shared in the income from the investment only a proportionate amount of the principal sum would have been includible in the gross estate, is not properly before this Court.

ARGUMENT

By Purchasing a Single Premium Life Insurance Policy, Which Was Issued Without a Medical Examination Only On Condition that an Annuity Contract Be Purchased, the Decedent Made a Single Investment in Which She Reserved the Income for Her Life and by Which She Caused the Principal To Be Paid to Her Designees at Her Death. The Transfer Is Includible in the Gross Estate of the Decedent under Section 811 (c)(1)(B) of the Internal Revenue Code

Section 811 (c)(1)(B), Internal Revenue Code (Appendix, *infra*, p. 24),[1] requires that there be included in the gross estate, which is subject to the estate tax, "any interest * * * of which the decedent has at any time made a transfer * * * by trust or otherwise—under which he has retained for his life * * * or for any period which does not in fact end before his death the possession or enjoyment of, or the right to the income from, the property * * *."

The issue here is whether the decedent made a transfer of the kind described by Section 811 (c) (1) (B) when she purchased, as a combination of

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[1] As amended by Section 7 (a), Act of October 25, 1949, c. 720, 63 Stat. 891. Section 7 (b) of that Act made provisions of Section 7 (a) applicable to estates of decedents dying after February 10, 1939. Qualifying provisions of Section 7 (b), as further amended by Section 608 of the Revenue Act of 1951, c. 521, 65 Stat. 452, respecting transfers before June 7, 1932, and where the decedent died prior to January 1, 1951, are not applicable here since the transfer in this case was in 1935 when the decedent purchased the annuity and "life insurance" policy and transferred the policy to her three children.

The quoted provisions of Section 811(c)(1)(B) which are pertinent here are identical with the provisions of Section 811 (c), prior to the 1949 amendment, which are cited in the opinion of the district court. (R. 33.)

contracts, a single premium annuity contract and a single premium life insurance policy (the latter being issued without a medical examination, solely because of the purchase of the annuity contract), pursuant to which she received stipulated annual payments during her lifetime and her children, to whom she assigned the so-called life insurance policy, received at her death the amount payable at that time.

It is the position of the Collector that the entire transaction was one in which the decedent made a single investment, the income from which she reserved to herself for her lifetime and the principal of which she gave to her children to be paid at her death. A transfer of this nature falls squarely within the language and intended scope of Section 811 (c)(1)(B). *Conway* v. *Glenn*, 193 F. 2d 965 (C. A. 6th); *Burr* v. *Commissioner*, 156 F. 2d 871 (C. A. 2d), certiorari denied, 329 U. S. 785; *Estate of Reynolds* v. *Commissioner*, 45 B. T. A. 44. See also *Bank of New York* v. *Kelly*, 135 N. J. Eq. 418; cf. *Day* v. *Walsh*, 132 Conn. 5. The decision below, which reached the opposite conclusion, is demonstrably erroneous.

1. In determining the applicability of Code Section 811(c)(1)(B) to the circumstances of this case, the initial and crucial inquiry must focus on the essential nature of the transaction between the decedent and the insurance company. If regard be had only to form and not to substance, it might appear that the decedent entered into two, independent contractual relationships with the insur-

ance company. One was a non-refundable annuity contract which entitled her to receive annual payments for the remaining period of her life. The other was an insurance policy on her life, ownership of which she transferred by assignment to her children. This was the view of the court below, in holding that nothing was includible in the gross estate. Thus, the court stated (R. 56): "The money to be paid under the life contract was in no wise based or dependent upon the sum advanced to secure the annuities." The court further stated that the insurance company's promise to pay the life insurance proceeds was based (R. 56) "upon the sole consideration of the payment of the single premium of $53,717.04". And, in denying that the decedent retained a life interest in the income from the transferred property, the court stated (R. 57):

> It is contended that the annuity payments constituted income from the life policy. It would seem that to state the proposition is to demonstrate its fallacy. The annuities were bought and paid for in the annuity contract, when the insured paid in $22,000. None of this came out of the life insurance premium. The life policy was fully paid for by the $53,000 advanced for it; no part of it contributed in any way to the annuities. * * *

This premise, that the amount to be paid under the insurance policy was not dependent on the premium paid for the annuity contract, is incon-

sistent with the admitted fact (which the majority of the court below noted but thought to be (R. 56) "without legal significance") "* * * that the insurance company required that the annuity contract be purchased before the company would issue the so-called life insurance policy * * * without decedent having taken a physical examination * * *".[2]

As a matter of fact, an analysis of the circumstances in which these two contracts were issued and of their interdependence leads inevitably to the conclusion that they were integral parts of a unified transaction. Rather than constituting separate contracts of annuity and of life insurance, the combination of contracts resulted in a single investment of funds with the insurance company, with the income from the investment reserved to the decedent for her lifetime and with the principal of the fund payable to her designees at her death.

As a matter of law, that a transaction of this kind represents a single investment rather than separate contracts of annuity and life insurance within the meaning of the predecessors of Code Section 811(g) was settled by the decisions of this Court in *Helvering* v. *LeGierse*, 312 U. S. 531, and in the companion cases of *Estate of Keller* v. *Commissioner*, 312 U. S. 543, and *Tyler* v. *Helvering*, 312 U. S. 657. See Meisenholder, *Taxation of Annuity Contracts Under Estate and Inheritance*

[2] This allegation in the answer below (R. 7-8) must, of course, be taken as true on the taxpayers' motion for judgment on the pleadings.

Taxes, 39 Mich. L. Rev. 856, 883-887 (1941). This proposition was also accepted as the underlying basis for the decisions in *Goldstone* v. *United States,* 325 U. S. 687, 690, and *United States* v. *Tonkin,* 150 F. 2d 531, 535 (C. A. 3d), certiorari denied, 326 U. S. 771. The same view has been adopted in the administration of state inheritance tax laws. *Bank of New York* v. *Kelly,* 135 N. J. Eq. 418; *Day* v. *Walsh,* 132 Conn. 5; *In re Smiley's Estate,* 35 Wash. 2d 863.

The inseparability of the elements of the transaction here seems as obvious as it was in *LeGierse* and the other cited decisions. The decedent was 62 years of age when she purchased the so-called life insurance policy which was issued without a medical examination and which, for a single premium of $53,717.04, called for a payment of $72,000 by the insurance company at her death. The insurance company, however, would not have issued this life insurance policy to the decedent without a medical examination except on the condition that she purchase, as she did, the annuity contract which, for a single premium of $22,602.96, entitled her to annual payments of $1,618.03 until the time of her death, with nothing refundable no matter when she died. (R. 7-8, 12-32, 33.)

The reason an insurance company can issue what would appear to be a policy of life insurance under circumstances where the insured would otherwise be uninsurable will be found in the requirement that the applicant purchase the annuity contract at a stipulated, single premium deter-

mined by the amount of the insurance written.[3] This combination of contracts enables the insurance company to eliminate any insurance risk that would otherwise be present on account of the possibility of premature death. As this Court observed in *Helvering* v. *LeGierse*, 312 U. S. 531, 541:

> The fact remains that annuity and insurance are opposites; in this combination the one neutralizes the risk customarily inherent in the other. From the company's viewpoint, insurance looks to longevity, annuity to transiency.

Since the company would not issue the life insurance contract except in connection with the purchase of the annuity contract, it seems fairly evident that both contracts must be considered as integral parts of one transaction, even though, on their face, they appear as two separate documents. In this connection, it was stated in *LeGierse* (p. 540):

> The two contracts must be considered together. To say they are distinct transactions is to ignore actuality, for it is conceded on all sides and was found as a fact by the Board of Tax Appeals that the "insurance" policy would not have been issued without the annuity contract. Failure, even studious fail-

[3] In Meisenholder, *Taxation of Annuity Contracts Under Estate and Inheritance Taxes*, 39 Mich. L. Rev. 856, 883 (1941), it is pointed out that in this combination of contracts "* * * it is required that the total purchase price of both contracts shall be about ten percent greater than the face amount of the insurance." See also Note, 42 Col. L. Rev. 162, 165, fn. 12 (1942); Harwood and Francis, *Insurance and Annuities from the Buyer's Point of View*, 132-133 (1938).

ure, in one contract to refer to the other cannot be controlling.

When these contracts are considered together, as they must be, it is plain that the decedent, after paying a loading factor of six percent, i.e., $4,320,[4] invested the sum of $72,000 with the insurance company on which she was to receive a stipulated annual return of $1,618.03 (at the rate of approximately 2.2 percent) and that the principal was to be paid to her designees at her death. That the payments which she received constituted a return on such an investment is made clear by *LeGierse* in which the Court stated (p. 542):

> Here the total consideration was prepaid and exceeded the face value of the "insurance" policy. The excess financed loading and other incidental charges. Any risk that the prepayment would earn less than the amount paid to respondent as an annuity was an investment risk similar to the risk assumed by a bank; it was not an insurance risk as explained above.

Accord: *Burr* v. *Commissioner*, 156 F. 2d 871 (C. A. 2d), certiorari denied, 329 U. S. 785; *Conway* v. *Glenn*, 193 F. 2d 965 (C. A. 6th); *Estate of Reynolds* v. *Commissioner*, 45 B. T. A. 44; *Day* v. *Walsh*, 132 Conn. 5; *Bank of New York* v. *Kelly*,

[4] The loading factor is the excess of the combined premiums over the face amount of the "insurance" payable at death and is designed to compensate the company for certain overhead expenses, like premium taxes and agents' commissions. *Helvering* v. *LeGierse*, 312 U.S. 531, 542; *Commissioner* v. *Keller's Estate*, 113 F. 2d 833, 835 (C.A. 3d), affirmed, 312 U.S. 543.

135 N. J. Eq. 418; Meisenholder, *Taxation of Annuity Contracts Under Estate and Inheritance Taxes*, 39 Mich. L. Rev. 856, 884 (1941).[5]

If, instead of embodying this single transaction in separate documents, the parties had provided in a single contract that the decedent, after paying a loading factor of $4,320, should invest $72,000

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[5] "Payments tantamount to the income from the whole fund deposited were to go to her during her life." *Estate of Reynolds* v. *Commissioner*, *supra*, p. 50. "* * * the investment was analogous to a simple annuity with principal payable at death, * * *." *Burr* v. *Commissioner*, *supra*, p. 872. "Intrinsically, the transaction is a transfer of the principal sum invested, coupled with a reservation for the benefit of the transferor, of a life interest." *Bank of New York* v. *Kelly*, *supra*, p. 421. "The situation * * * approximates that of a trust with income payable to the settlor during his life and the principal payable to certain named persons at his death, * * *." *Day* v. *Walsh*, *supra*, p. 14.

In G.C.M. 21716 (1940-1 Cum. Bull. 82 (revoking G.C.M. 6395, VIII-1 Cum. Bull. 67 (1929)), where the combination of contracts was embodied in a single instrument, it was ruled that the annual payments constitute income, taxable in their entirety to the recipient, and that they did not represent true annuity payments, consisting of partial returns of capital, within the meaning of Code Section 22 (b)(2). Accord: *Igleheart* v. *Commissioner*, 174 F. 2d 605 (C.A. 7th). Decisions holding that, in identical or similar circumstances, the payments are true annuity payments, consisting partially of income and partially of returns of capital for income tax purposes under Section 22 (b)(2) of the Internal Revenue Code and corresponding sections of prior enactments (*Commissioner* v. *Meyer*, 139 F. 2d 256 (C.A. 6th); *Helvering* v. *Meredith*, 140 F. 2d 973 (C.A. 8th); *Bodine* v. *Commissioner*, 103 F. 2d 982 (C.A. 3d), certiorari denied, 308 U.S. 576) are of doubtful validity. But even if the annuity payments are considered to be both income and principal, that does not negate the conclusion that the decedent received whatever income was earned. See Meisenholder, *supra*, p. 901. At all events, the estate and income tax laws are not completely correlated or integrated, and Congressional treatment of such payments for income tax purposes does not resolve the question of their treatment for estate tax purposes. *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 47-48.

with the insurance company, should receive $1,618.03 each year for the balance of her life, and that the insurance company should repay the $72,000 to the decedent's designees at her death, it would be hard to imagine a clearer case calling for the application of Section 811 (c)(1)(B).[6] Such a transfer, with the decedent reserving the investment income from the property during her lifetime, and with the objects of her bounty coming into possession or enjoyment of the fund at the time of her death, is the very kind of substituted testamentary disposition which Congress intended to be taxed to the estate. *Helvering* v. *Bullard*, 303 U. S. 297; *Hassett* v. *Welch*, 303 U. S. 303; 74 Cong. Record (Part 7), pp. 7078-7079, 7198-7199; H. Rep. No. 708, 72d Cong., 1st Sess., pp. 46-47

[6] The situation in this case is not essentially different from *Commissioner* v. *Clise*, 122 F. 2d 998 (C.A. 9th), certiorari denied, 315 U.S. 821, and *Mearkle's Estate* v. *Commissioner*, 129 F. 2d 386 (C.A. 3d), where the decedent had purchased, for a single premium, a joint and survivor annuity contract. In both those cases it was held that the transfer resulted in a retained life income and that the value of the annuity payable to the survivor was includible in the gross estate of the decedent under the statutory provisions corresponding to Code Section 811(c)(1). (Compare, however, *Higgs' Estate* v. *Commissioner*, 184 F. 2d 427 (C.A. 3d), and *Commissioner* v. *Twogood's Estate*, 194 F. 2d 627 (C.A. 2d). Both these cases distinguished *Clise* and *Mearkle's Estate*, where an employee was entitled to receive an annuity and elected to receive a smaller annual sum, thereby enabling his wife to receive a survivorship annuity.) The *Clise* and *Mearkle's Estate* decisions also rested on the conclusion that such a transfer is one intended to take effect in possession or enjoyment at or after death, which was the basis of the decision in *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281 (C.A. 5th), certiorari denied, 314 U.S. 634. This additional ground for taxability is also present in *Morristown Trust Co.* v. *Manning*, 200 F. 2d 194 (C.A. 3d), pending on the taxpayer's petition for a writ of certiorari, No. 616, this Term.

(1939-1 Cum. Bull. (Part 2) 457, 490-491; S. Rep. No. 665, 72d Cong., 1st Sess., pp. 49-50 (1939-1 Cum. Bull. (Part 2) 496, 532. See also *Commissioner* v. *Estate of Church,* 335 U. S. 632, for the history of transfers with retained life interests, and Bittker, *Church and Spiegel: The Legislative Sequel,* 59 Yale L. J. 395 (1950), where the subsequent legislative changes (inapplicable here) are reviewed.

In both *Helvering* v. *LeGierse,* 312 U. S. 531, and *Goldstone* v. *United States,* 325 U. S. 687, which involved combination annuity-insurance contracts, it was held that these contracts were integrated transactions, and therefore were not "insurance," and the estates were not entitled to the exemption of $40,000, which Section 302(g) of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended, extended in those taxable years to amounts "receivable * * * as insurance." It was further held that the proceeds paid at death were taxable under the predecessor of Section 811(c)(1)(C). Specifically, in *LeGierse,* where the decedent had reserved the right to change the beneficiary, it was held that the transfer was taxable under the clause in Section 302(c) of the Revenue Act of 1926, *supra,* which dealt with transfers "intended to take effect in possession or enjoyment at or after * * * death." In the *Goldstone* case, the transfer was characterized in the same manner, the decedent there having retained a reversionary interest in the ownership of the policy in the event that he outlived his wife and in the insurance proceeds

if he outlived his wife and their daughters; this Court (p. 693) noted the alternative argument advanced by the Commissioner to the effect that the transfer was also taxable because the decedent had retained the income for life, but found it unnecessary to consider the point.

While the court below (R. 56) acknowledged that *LeGierse* had decided that this combination of contracts was a single investment program and, consequently, not insurance within the meaning of Code Section 811 (g), it, nevertheless, thought that the same conclusion did not follow where Section 811 (c)(1)(B) is involved and that *LeGierse* did not require the conclusion (R. 56) "that this investment program, made up of the two contracts, was indivisible."

But where two related subsections of the statute are involved, each dealing with *inter vivos* dispositions of property which Congress has subjected to the estate tax because they have a close affinity to testamentary dispositions, it is most unlikely that the legislature could have intended that the very same transaction should be treated as an integral whole under one subsection, but should be fragmented for the purposes of a cognate subsection. If the transaction is an investment which is not insurance under subsection (g), it is difficult to understand why it would be insurance and not an investment under subsection (c).[7]

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[7] It is important to observe that Code Section 811 (g), as amended by Section 404 of the Revenue Act of 1942, c. 619, 56 Stat. 798, effective with respect to estates of decedent's dying thereafter, amended and enlarged the scope of Section 811 (g)

In the last analysis, the treatment of this kind of combination of contracts in *LeGierse* and *Goldstone* as inseparable segments of a single investment is as applicable to the question whether an interest in the property has been retained for the period of the grantor's life as it is to the question whether the transfer, in other respects, takes effect at the grantor's death. When the contracts are viewed as a single investment, it seems incontrovertible that the decedent retained the income for her life and that the transfer is includible in the gross estate under the express terms of Code Section 811 (c)(1)(B).

Since the issuance of the life insurance policy was conditioned upon the purchase of the annuity,

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of the Internal Revenue Code so that where a decedent pays the premiums on a policy of life insurance on his own life, the full amount of the proceeds (there being no basic exemption) is to be included in the decedent's gross estate even though the policy has been assigned irrevocably during the decedent's lifetime, and even though he has retained none of the incidents of ownership. H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 162-163 (1942-2 Cum. Bull. 372, 490-492); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 234-236 (1942-2 Cum. Bull. 504, 676-677); H. Conference Rep. No. 2586, 77th Cong., 2d Sess., p. 69 (1942-2 Cum. Bull. 701, 725).

Section 811 (g), however, is only applicable to amounts "receivable * * * as insurance", and *Helvering* v. *LeGierse*, 312 U.S. 531, undoubtedly means that the section, in its present broad form, is inapplicable to contracts of the kind here involved. A consequence of the decision below in holding that, despite *LeGierse*, a separate contract of insurance is involved for purposes of Section 811 (c)(1)(B) will be to permit such transfers to go untaxed, even in the period of 1942-1949. Under the decision of the court below, Section 811(g) could be avoided by anyone who purchased a combination of insurance and annuity contracts.

Whether, under the decision below, such transfers would go untaxed where the transfer occurs after October 7, 1949, is, in view of Code Section 811 (c) (3), a matter on which no opinion is expressed.

and since the amount of the life policy was geared to the amount of the annuity premium,[8] the Court of Appeals erred in concluding that the amount paid by the company under the life policy was not dependent on the premium payment for the annuity, and in concluding that the sole consideration paid for the life policy was the premium called for by that contract (see *supra*, p. 8). The decedent, uninsurable without a medical examination, could not have given her children the right to receive $72,000 from the insurance company at her death simply by paying a premium of $53,717.04. Actually, as we have shown (pp. 10-11, *supra*), the required annuity was the method by which the insurance company was able to neutralize any life insurance risk and, although written into separate contracts, it was the method whereby the company enabled the insured to achieve the investment of a single sum of money. It was this nexus between the contracts which impelled this Court in *LeGierse* to conclude that the two contracts must be considered together as a single investment contract and that the failure of one contract to refer to the other did not make them distinct transactions.

2. The unity of these two contracts is, of course, not altered by the fact that the decedent assigned the ownership of the insurance policy. This very point was anticipated in the *LeGierse* case when it was pointed out (p. 541)—

> the fact that the policy could have been assigned is immaterial since, no matter who

[8] See fn. 3, *supra*, p. 11.

> held the policy and the annuity, the two contracts, relating to the life of the one to whom they were originally issued, still counteracted each other.

Accord: *Conway* v. *Glenn*, 193 F. 2d 965 (C.A. 6th); *Burr* v. *Commissioner*, 156 F. 2d 871 (C.A. 2d), certiorari denied, 329 U.S. 785; *Estate of Reynolds* v. *Commissioner*, 45 B.T.A. 44; *Bank of New York* v. *Kelly*, 135 N.J. Eq. 418. Cf. *Mearkle's Estate* v. *Commissioner*, 129 F. 2d 386 (C.A. 3d); *Commissioner* v. *Clise*, 122 F. 2d 998 (C.A. 9th), certiorari denied, 315 U.S. 821. See Meisenholder, *Taxation of Annuity Contracts Under Estate and Inheritance Taxes*, 39 Mich. L. Rev. 856, 898 (1941).

The assignment of the life policy, which entitled the owners to receive at the decedent's death the net amount invested with the insurance company, was no different from any lifetime transfer, whether in trust or otherwise, of a remainder interest in property which will come into possession after the termination of a life estate retained by the decedent. No matter how absolute the transfer of the remainder interest, no matter how vested it may be, the retention of a life interest in the income of the property is, under the statute, sufficient to cause the remainder interest to be taxed in the decedent's gross estate.[9] Cf. *Peek* v. *United*

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[9] In *Helvering* v. *Bullard*, 303 U.S. 297, 302, and in *Commissioner* v. *Estate of Church*, 335 U.S. 632, 638, this Court repeated with approval the observation made in *Matter of Keeney*, 194 N.Y. 281, 287, affirmed, 222 U.S. 525, to the effect that—

> It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is a transfer with reservation of a life estate.

States, 38 F. Supp. 826 (E.D. Pa.). The court below overlooked the purpose of Code Section 811 (c)(1)(B) in holding that, because the decedent during her lifetime had transferred ownership of the life policy, it (R. 56) "could, therefore, under no conception, constitute a part of her taxable estate when she died thereafter."

3. The court below also seems to have been impressed by the fact that the decedent's children could have obtained the cash surrender value of the policy during the decedent's lifetime and by the fact that she, nevertheless, would have continued to receive the stipulated annual payments during her lifetime. (R. 57.) There are several reasons why this is a matter of no significance.

The initial and conclusive answer lies in the fact that the policy was not actually surrendered for a lesser value during the decedent's life, so that she did continue to receive the income from her investment for the period of her life and her children did become entitled to receive the full principal sum because of her death. Section 811 (c)(1)(B), by its express terms, applies not only when the income from property has been retained for the period of the decedent's life, but also where the income has been retained "for any period which does not in fact end before his death * * *." Section 811 (c)(1)(B) thus looks to the facts as they actually existed at a decedent's death and it is immaterial that other circumstances might have occurred during her lifetime. The same conclusion results under other subsections. For example, in taxing the de-

cedent's interest in a joint tenancy, Section 811 (e) looks to the existence of the joint tenancy at the decedent's death even though the other joint tenant could have severed the estate during the decedent's lifetime. *United States* v. *Jacobs*, 306 U.S. 363, 371. Again, in *Goldstone* v. *United States*, 325 U.S. 687, 692, 693, the fact that the wife could have but did not extinguish the decedent's reversionary interest during his lifetime was considered to be of no moment; the property was held taxable as a transfer intended to take effect in possession or enjoyment at death because the decedent did, in fact, possess such an interest at the time of his death.

It is unnecessary, accordingly, to decide in this case whether the taxable consequences would have been altered if the children had accepted the lesser cash surrender value during the decedent's lifetime. *Burr* v. *Commissioner*, 156 F. 2d 871, 872 (C.A. 2), certiorari denied, 329 U.S. 785.[10] Furthermore, the cash surrender value of a life policy is, even under normal circumstances, not the measure of what is acquired by the transferee of a policy. *Guggenheim* v. *Rasquin*, 312 U.S. 254. Here, where the decedent was not an insurable risk, and where

[10] In the clearest case covered by Section 811 (c) (1) (B), namely, where a decedent makes an *inter vivos* transfer of a remainder interest after first carving out a life estate, the remainderman possesses the right, absent restrictive provisions in the instrument of transfer, to sell his interest at a value discounted for the life expectancy of the life tenant. We know of no reason why the statute would not be applicable in circumstances where the remainderman has exercised this right. From the viewpoint of the owner of the life policy, the right to take down the cash surrender value, which increases as the life expectancy of the insured decreases, is no different from the right of the remainderman to anticipate his remainder interest.

the children were, nonetheless, entitled to receive the face value of the policy no matter when she died, it is most unrealistic to consider the possibility of surrender as a practical one.

4. Although the fact that the children had the right to receive dividends does not change the essential integrated nature of the two contracts (*Goldstone* v. *United States*, 325 U. S. 687), it is possible that the taxpayers will renew in this Court a contention which was first presented to the Court of Appeals, but which that court did not mention. This contention is that the payment of dividends to the children could be regarded as the payment of part of the income on the investment, with the balance of the income being paid to the decedent in the form of annuity payments. Accordingly, taxpayers may argue that only a *pro-rata* share of the principal should be included in the gross estate.

This contention, however, was not fairly presented by the taxpayers' motion for judgment on the pleadings. The record is barren of the amounts, if any, of the dividends paid to the children. Clearly the record does not support the conclusion of the courts below that nothing was includible in the gross estate. Inasmuch, however, as the Collector did not himself move for judgment, we do not believe that we can ask this Court, if it reverses the judgment of the court below, to instruct that court or the district court to enter judgment for the Collector. There remain several contested factual issues, which, although not relevant

to its disposition in this Court, may be relevant to the ultimate disposition of the case. Accordingly, we suggest, if the Court remands this case to the district court for a trial on the merits, that the questions of the right of the taxpayers to raise this issue of a possible allocation of the principal in accord with the distribution of dividends, of the relevancy, if any, of this issue, and of the probative nature of facts to support such a contention, be open in the courts below.

CONCLUSION

The decision of the Court of Appeals is erroneous and should be reversed.

Respectfully submitted,

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APRIL, 1953.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * *

(c) [as amended by Section 7 (a) of the Act of October 25, 1949, c. 720, 63 Stat. 891] *Transfers in Contemplation of, or Taking Effect at, Death*—

(1) *General Rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

* * *

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; or

(C) intended to take effect in possession or enjoyment at or after his death.

* * *

(26 U.S.C. 1946 ed., Supp. III, Sec. 811.)

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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 566

CARTER H. HARRISON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE,
Petitioner,

vs.

EDWIN J. BOHNEN, EXECUTOR OF THE ESTATE OF MARY A. BOHNEN, AND INDIVIDUALLY; THEODORE G. BOHNEN AND VIRGINIA E. BOHNEN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 566.

CARTER H. HARRISON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE,
Petitioner,

vs.

EDWIN J. BOHNEN, EXECUTOR OF THE ESTATE OF MARY A. BOHNEN, AND INDIVIDUALLY; THEODORE G. BOHNEN AND VIRGINIA E. BOHNEN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

OPINIONS BELOW.

The opinion of the District Court (R. 33-38) is reported at 100 F. Supp. 118. The opinion (R. 55-57) and dissenting opinion (R. 58-59) of the Court of Appeals are reported at 199 F. 2d 492.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 29, 1952. (R. 60.) The petition for a writ of certiorari was filed on January 26, 1953, and was granted on March 9, 1953. (R. 63.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

STATUTE.

The applicable provisions of the statute involved are set forth in the Appendix hereto. The statute is set forth in the same form used in petitioner's brief, *i. e.*, as amended in 1949, in order to obviate confusion in reference. The language is precisely the same as that in effect at the time of the death of decedent in 1942, although somewhat rearranged.

SUMMARY OF ARGUMENT

Decedent purchased a life insurance contract and an annuity contract. The life contract would not have been sold without the annuity contract. She then made an absolute gift of the life insurance contract to her children, retaining no interest in it. If it be assumed that both contracts were acquired in a single integrated transaction, they were nevertheless divisible and were in fact completely severed by the decedent, just as shares of stock might have been acquired in a single transaction and subsequently severed by a gift of part and a retention of the balance. Decedent reserved no interest of any kind, reversionary or otherwise, in either the life insurance contract or the income therefrom.

The present situation involves no possible aspect of tax avoidance, and falls within neither the letter nor spirit of Section 811 (c)(1)(B). Decedent retained the annuity contract which she could have purchased without the life insurance contract. (Instead of purchasing the life insurance contract, she could have made a cash gift to the donees of the amount of the premium.) The retained interest situations subject to Section 811 (c)(1)(B) always involve an arrangement in which the donee's interest is diminished for the advantage of the decedent. Here, if anything, the converse was true. The purchase of the annuity contract was a condition to the procuring of the life insurance contract for decedent's children. Moreover, such benefits as were conferred on the children were complete and irrevocable at the time of purchase, and nothing further passed from decedent to the donees at death, either in fact or in theory.

Helvering v. *LeGierse*, 312 U. S. 531 (1931), is inapplicable to the instant case. In that case decedent retained full ownership of both policies until death. The case merely held that the issuance of the two contracts in a single transaction obviated the "insurance risk" which would otherwise have been present. In *Goldstone* v. *United States*, 325 U. S. 687 (1945), the Supreme Court specifically declined to extend the *LeGierse* case to the instant situation.

The instant case involves no question of an insurance exemption in view of the present condition of the Code; hence the nature of the property originally acquired by decedent, or whether acquired in one or two transactions, is utterly immaterial. Nevertheless, petitioner devotes virtually his entire brief to this false issue and ignores the determinative fact of what decedent did with the property she had acquired.

The annuity payments were not the income from the life insurance premium, but rather comprised of income and principal of the annuity premium. The income from the life insurance premium consisted of the dividends on that policy and the increase in value of that policy from 65.8% to 100% of face value. (R. 25.) Both of these items of income were irrevocably assigned to respondents with the contract and collected by them.

Respondents were entitled to surrender the life insurance policy at any time after one year from date of issuance, and receive amounts ranging upward from $47,376. (R. 25.) Despite such surrender decedent would have continued to receive the annuity payments. Income is the fruit which grows upon the tree of principal. Fruit which continues to grow after a tree is cut must grow upon some other tree. The tree upon which the annuity payments grew was not the life insurance premium, but the annuity

premium, and the payments constituted in part a liquidation of the latter tree itself.

Respondents concede that petitioner's position is sustained by the cases of *Estate of Reynolds* v. *Commissioner*, 45 B. T. A. 44 (1941), *Burr* v. *Commissioner*, 156 F. 2d 871 (C. C. A. 2, 1946), and *Conway* v. *Glenn*, 193 F. 2d 965 (C. A. 6, 1952), but contend that these cases were erroneously decided and should be repudiated by the court. They are erroneous for the following reasons:

1. They misconceive the holding in the *LeGierse* case.
2. They confine attention to the nature and character of the property and treat the transfer as of no significance.
3. They misconceive the holdings in *Commissioner* v. *Clise*, 122 F. 2d 998 (C. A. 9, 1941) and *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281 (C. A. 5, 1941).
4. They confuse the several clauses of Section 811 (c) and disregard the purpose underlying the imposition of the estate tax on *inter vivos* transfers.
5. They err in concluding that the annuity payments constituted income from the combined premiums.

The results reached by the courts below could be independently arrived at by conceding the petitioner's contentions on all other points and applying the apportionment provisions of Section 81.18 of the Estate Tax Regulations, 105.

the premium allocated to the life policy. This would certainly not have been tax avoidance. To no greater extent do the facts of the instant case constitute tax avoidance.

The real and only issue in this case is whether or not decedent did in fact make a transfer of property and retain the income from that property during her lifetime. Even more specifically stated, the issue is: Were the annuity payments the "income" from the life policy transferred to respondents? The Court of Appeals below aptly said (R. 57):

> "It is contended that the annuity payments constituted income from the life policy. It would seem that to state the proposition is to demonstrate its fallacy. The annuities were bought and paid for in the annuity contract, when the insured paid in $22,000. None of this came out of the life insurance premium. The life policy was fully paid for by the $53,000 advanced for it; no part of it contributed in any way to the annuities. If the assignees had cashed the life policy, as they had a right to do, the insured would have still been entitled to receive the annuities. The assignees were in truth, not by any fiction the absolute owners of the life policy, whereas the decedent kept for herself the annuity contract."

In his argument petitioner nowhere actually addresses himself to the real issue, beyond stating the conclusion that the annuity payments constituted the income from the life policy, and asking the court to assume this ultimate issue upon the authority of decisions cited. (B. 12 and 13.) Certain of these decisions support petitioner's contention; the others are inapplicable. *Estate of Reynolds* v. *Commissioner*, 45 B. T. A. 44 (1941); *Burr* v. *Commissioner*, 156 F. 2d 871 (C. A. 2d, 1946), certiorari denied, 329 U. S. 785; and *Conway* v. *Glenn*, 193 F. 2d 965 (C. A. 6th, 1952), cited

in the order of decision, do support petitioner's position.[2] These cases are substantially identical factually with the case at bar. Respondents conceded this at the time they filed their motion for summary judgment in the district court. They did not attempt to distinguish these cases then and they do not do so now.[3] It is respondents' position that these cases were erroneously decided and should be repudiated by this court. Necessarily, a major portion of this brief is devoted, as were the briefs in the courts below, to an analysis of these cases, and particularly of the *Burr* case.

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2. Petitioner also cites (B. 12) *Bank of New York* v. *Kelly*, 135 N. J. Eq. 418 (1944), involving a somewhat similar issue arising under a state succession tax. That case follows the reasoning and authority of *Estate of Reynolds* v. *Commissioner*, 45 B. T. A. 44 (1941).

3. It would seem that the doctrine of these cases as well as certain originally erroneous doctrines of the common law, has arisen from the tendency prevalent among lawyers to attempt to distinguish upon a basis of comparatively insignificant facts cases erroneously decided, rather than challenging the basis for the erroneous decision. This has apparently occurred in connection with the present problem. The factual situation of all three cases was substantially the same (as is that of the instant case), except that in the *Reynolds* case the life insurance policies were transferred irrevocably to a trustee rather than to the ultimate beneficiaries, and except that the transfers there were made in conjunction with certain other revocable trust transfers, which doubtless influenced the Board of Tax Appeals and lent some semblance of color to the Commissioner's contention. In the *Burr* case, counsel for the taxpayer, rather than assailing the soundness of the *Reynolds* decision, apparently attempted to distinguish that case on the facts. In the *Burr* case, the Court refers to the *Reynolds* case as follows:

> "In that case, too, the assignment was irrevocable; and it is not to be distinguished, as petitioners claim, because it was to a trustee. The interposition of the trustee was of no significance; he had power to assign and to surrender the policy, and was required to distribute all dividends to the beneficiaries. The case was noted with approval in 42 Col. L. Rev. 162." [156 F. 2d 871, 872.]

In *Conway* v. *Glenn*, 193 F. 2d 965, taxpayer's counsel sought to distinguish the *Burr* case upon a basis of the following facts stated in the opinion of the Court of Appeals (p. 966):

> "After this transfer was made by the decedent and during

The other cases cited by petitioner are wholly inapplicable and lend his position no support. These cases fall into three categories, typified respectively by the following cases:

Igleheart v. *Commissioner*, 174 F. 2d 605 (C. A. 7th, 1949).

Commissioner v. *Clise*, 122 F. 2d 998 (C. A. 9th, 1941).

Helvering v. *LeGierse*, 312 U. S. 531.

For the most part, these cases are examined and distinguished at length later in this brief. In none of these cases did the beneficiary receive anything susceptible of enjoyment during the lifetime of the decedent, and in each of these cases the beneficiary was required to survive the decedent to receive any benefit. The *Igleheart* case involved a straight investment contract, with stipulated payments of income, and principal payable on demand or on death.

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his lifetime, the owners of the life insurance policy on two occasions exercised rights under the contract: (1) they named their mother as beneficiary to receive fixed monthly payments from the proceeds of the policy on the death of their father; and later (2) they changed the beneficiary interest in the policy so that their mother would receive only the interest income on the face amount of the policy."

The following extract from page 12 of Appellant's Brief in *Conway* v. *Glenn* indicates the argument made:

"The government contends that the instant case is on all fours with the *Burr* case, *supra*. A very important distinction can be made, however. In the *Burr* case, *supra*, the sons exercised none of their rights of ownership during their father's lifetime. In the case at bar, the children, who are the sole owners of the life policy, exercised their unrestricted rights of ownership by assigning to their mother, if she should survive the decedent, the entire income from the policy for her life (R. 23, 24). They thereby diminished their interest in the property."

Upon payment of principal, income ceased.[4] The *Clise* case involved joint and survivor annuity contracts in each of which decedent had named herself as primary annuitant, and some other person as a second annuitant to receive the annuity after her death, and until the second annuitant's death. In neither the *Igleheart* nor *Clise* cases was it possible to withdraw any principal sum from the insurance company and still have the stipulated payments continue to any party. In both cases the payments did in fact consist of income from the total premiums invested.

The only question determined by the Supreme Court in the *LeGierse* case was that in the case of annuity and life insurance policies, such as those here under consideration, the policies should be treated as a single investment contract, the risks of which neutralize one another, and that therefore, the life insurance contract did not constitute

4. The case involved the question of whether or not the payments were taxable for income tax purposes as annuity payments under Section 22 (b)(2). The Court held that they were not and that such payments were income in their entirety. The pertinent facts are stated by the Court as follows (174 F. 2d 605):

> "Prior to the taxable year 1941 taxpayer had purchased nine insurance contracts from three insurance companies, each providing for the payment of a fixed principal sum to the taxpayer upon his surrender of the contract (or to designated beneficiaries upon his death) and for annual payments to him in the interim. Each contract was issued in consideration of a single premium. A medical examination was not a prerequisite for any of the contracts. The premiums paid by taxpayer were not computed with reference to his age or tables of mortality, but in each contract the premium was equal to the principal sum of the contract plus an additional 5%, except for two contracts for which he paid an additional 6%. The premium for each contract was the same as charged any applicant for a similar policy regardless of age and sex.
>
> "Except for a small percentage charge, the principal sum of each contract corresponds with the single premium paid therefor. Upon surrender of the contract at any time, the principal sum thereof is payable to taxpayer. No matter how many annual payments he may have received, he is still entitled, on demand, to have the principal sum returned to him intact."

"insurance" within the purview of Section 302 (g)[5] so as to entitle the estate to the $40,000 deduction for insurance therein provided, a deduction subsequently eliminated from the Code. There was no other question pending before the Court, and no other question was decided by the Court. In the *LeGierse* case both contracts with the insurance company remained the property of the decedent at his death; hence, there could be no possible question as to "includibility" in the gross estate. The question was solely one of a deduction, which could not possibly arise unless includibility were assumed or conceded. It is true that the Court said that the deficiency in the *LeGierse* case had been properly assessed, but simply because the deduction claimed by the taxpayer could not be allowed.

Petitioner takes the position, as did the courts in *Estate of Reynolds* v. *Commissioner*, 45 B.T.A. 44 (1941); *Burr* v. *Commissioner*, 156 F. 2d 871 (C. A. 2d, 1946) certiorari denied, 329 U. S. 785; and *Conway* v. *Glenn*, 193 F. 2d 965 (C. A. 6th, 1952), that the *LeGierse* case is dispositive of the present issue. This assumption is one in which the Supreme Court itself has specifically declined to concur. *Goldstone* v. *United States*, 325 U. S. 687, 693 (1945).

In the *Goldstone* case the decedent had purchased a single premium life insurance policy and an annuity contract under the arrangement common to most of the cases herein referred to. The life policy designated his wife, his daughters, or his estate as beneficiaries, in the order named. Both policies gave the decedent's wife the unrestricted

5. Prior to amendment in 1942, Sec. 811 (g), formerly 302 (g) read as follows:

"(g) Proceeds of Life Insurance.—To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

power to assign them, borrow money, receive dividends, change beneficiaries, and surrender the contract and obtain the surrender value thereof. Provision was made that if the wife predeceased the decedent, then the rights of ownership should vest in the decedent to the extent that such powers had not otherwise been exercised by the wife. At the time of decedent's death, he was survived by his wife and daughters, and the wife had not surrendered, assigned, or otherwise alienated either of the contracts.

Two questions were presented in the case: One as to whether or not the taxpayer was entitled to the specific "insurance" exemption provided in Section 302 (g), and the second, whether or not the proceeds of the life insurance policy were includible in the gross estate. The court cited and relied upon the *LeGierse* case, solely for the purpose of ruling against the taxpayer with reference to the applicability of the insurance exemption provisions of Section 302 (g). With reference to the second question, *i. e.*, whether or not the proceeds of the life policy should be includible in the gross estate, the court made no reference whatever to the *LeGierse* case, but predicated includibility squarely upon *Helvering* v. *Hallock*, 309 U. S. 106 (1940),[6] that the decedent retained "a contingent reversionary interest in the entire proceeds of both contracts."

Attention is particularly invited to the fact that the government urged upon the court the argument relied upon in the instant case, and subsequently approved by the Second Circuit Court of Appeals in the *Burr* case, and that the

6. Decedent had transferred property into trust, giving the income to his wife for life, and providing that upon her death the corpus should be delivered to decedent, or, if he were not alive, to his children. The court held that the retention of the reversionary interest by the decedent rendered the property includible under § 302 (c), now § 811 (c) as having passed by a transfer "intended to take effect in possession or enjoyment at or after his death."

court specifically declined to pass upon that argument. The court used the following language (325 U. S. 687, 693):

> "In our view of the case we need not consider the alternative argument urged by the United States to the effect that the specific amendments to §302 (c) are also applicable since the decedent actually received an annual return from the contracts for a period which did not in fact end before his death."

It should be remembered that the opinion in the *Goldstone* case was written by Mr. Justice Murphy, who wrote the opinion in the *LeGierse* case. Had it been the intention of the court in the *LeGierse* case to lay down as broad a doctrine as that contended for by the government, and approved in the *Burr* case, certainly no one would have been better aware of that intention than Mr. Justice Murphy. Yet in the *Goldstone* case, the Court, speaking through Mr. Justice Murphy, declined to adopt any such doctrine. This was in 1945, four years after the *Reynolds* case, and only a year before the *Burr* case.

II.

THE CONTENTION OF PETITIONER ATTACHES UNDUE SIGNIFICANCE TO THE CHARACTER OF THE PROPERTY AND THE RELATIONSHIP OF DECEDENT TO THE INSURANCE COMPANY, AND IGNORES THE PARAMOUNT CONSIDERATION OF THE CHARACTER OF THE TRANSACTION WHICH WAS MADE WITH REFERENCE TO THE PROPERTY AND THE LEGAL EFFECTS THEREOF.

As suggested at the outset, petitioner has devoted by far the major portion of its argument to consideration of the nature of the contractual relations between decedent and the insurance company, and apparently attaches so much importance to this consideration that he tends to treat as of no significance the actual transaction upon

which the assertion of the tax is predicated, *i. e.*, the transfer.[7] The question of taxability must be determined on a basis of the following provision of the statute:

> "To the extent of any interest therein of which the decedent has at any time made a transfer * * * under which he has retained for his life * * * (i) the possession or enjoyment of, or the right to the income from, the property * * *." (I. R. C., Section 811 (c) (1)(B).)

Immediately after stating his position, petitioner addresses himself to what he apparently believes to be the crux of the argument:

> "1. In determining the applicability of Code Section 811 (c)(1)(B) to the circumstances of this case, the initial and crucial inquiry must focus on the essential nature of the transaction between the decedent and the insurance company."

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7. Thus petitioner brushes aside as not material or of no significance—

(1) The fact that assignees of the life policy could have surrendered it at any time (Pet. Br. 5);

(2) The fact that they were entitled to receive dividends on the life policy (Pet. Br. 5);

(3) The distinction between the instant situation wherein the life insurance could be surrendered without affecting the annuity payments and several situations in which continued receipt of annuity payments is dependent upon keeping the life insurance contract in effect. These other situations are set out both in the text and the footnote both hypothetically and by citation of cited cases with utter disregard of the significance of the "transfer" made in the instant case (Pet. Br. 13-14).

Petitioner apparently follows the technique of the court in the *Burr* case, discussed in detail later in this brief, which technique is epitomized in the following language from the *Burr* opinion (156 F. 2d 871):

> "The two purchases were obviously a single transaction, the annuity premium being part of the consideration for the insurance policies. Unless differentiated because of the subsequent assignment, therefore, the case is squarely within the Supreme Court's decision in *Helvering* v. *LeGierse*, 312 U. S. 531, 61 S. Ct. 646, 85 L. Ed. 996, holding the proceeds of the policies taxable under § 811 (c)."

It is submitted that petitioner has wholly misconceived the issue. The statute refers to property and interests in property, without particularly defining or limiting them, obviously intending the category to be all embracing. The statute makes no distinction as to what the type of property is, and it is submitted that the nature and character of the property is immaterial. The pertinent inquiry is: What did the decedent do with the property?

Respondents' position is that the decedent acquired certain property (and for the purpose of Section 811 (c)(1)(B) it makes no difference whether the property was or was not insurance, or by what name or designation it is described); that she gave away part of this property and kept part of it; and that she retained no interest in the part she gave away.

Respondents submit that it is immaterial whether the property originally acquired constituted one parcel of property or several, or whether it was acquired in one transaction or several, inasmuch as the property was certainly of a type which was susceptible of division, whatever its original character with reference to unity or integration may have been.

If a father desires to buy a quarter section of land from a neighboring farmer for the purpose of making a gift of it to his son, and he is unable to buy the quarter section without buying a complete half section of which it is a part, and he buys the half section and then gives the quarter section to his son without any strings attached and keeps the other quarter until his death, and farms and enjoys it and derives the income therefrom, it certainly cannot be contended that the quarter section given *inter vivos* to his son is includible in the estate at death by reason of the facts stated. If, on the other hand, the decedent, having purchased the half section, should then decide that he will

reserve unto himself a life interest in the entire half section, and should give only the remainder interest to his son, then obviously the entire half section is includible in decedent's estate at death under Section 811 (c)(1)(B).

Although in both instances the property was undoubtedly an integrated unit when purchased and was acquired in a single transaction, that matter is of no significance to the determination of the present question. It might become quite pertinent with reference to the allocation of cost basis for purposes of determining capital gains. The thing that is significant in determining applicability of Section 811 (c)(1)(B) is the character of the interest subsequently given and the character of the interest, if any, reserved.

The same considerations apply to an almost unlimited range of property and transactions, in which a person who desires to buy one item of property is required by the wishes of the seller to buy another item of property in an integrated transaction, and subsequently makes a complete unrestricted *inter vivos* gift of the item which he desired to buy, and retains the other item which he was required to buy. A homely example would arise in a situation where a man desires to buy a pony for his son from the owner who will not sell the pony, unless he can also sell the buggy used with it. The man buys the pony and buggy, makes an unrestricted gift of the pony to his son, and retains the buggy and makes such use of it as he can until his death. Certainly the petitioner would not contend that the value of the pony should be included in the decedent's estate.

Respondents will not unduly multiply examples, but offer merely one further situation which they deem closely analogous to the situation at bar.

A hypothetical corporation is willing to sell any amount of its preferred stock, but will only sell its common stock

to a purchaser who, at the same time, buys a specified amount of its preferred stock. (The analogy of the preferred and common stock to the annuity and life insurance policies respectively, is, of course, obvious.) A buyer enters into an agreement for the purchase of the required amount of preferred stock in order to obtain the common stock. He immediately thereafter makes an absolute, irrevocable, and immediate gift of the common stock to his son, including the entire income therefrom, but retains the preferred stock. Can it be seriously contended that because the donor, in order to secure the common stock, was required to purchase at the same time a given amount of preferred stock, he has, for that reason, retained an income for life in both the common and preferred stock so as to render the common stock includible and taxable in his gross estate at death? It is, of course, true that in determining and allocating the basis of the stock for purposes of capital gain, the Commissioner would have the right to treat the purchase as one entire contract, even after the transfer to the son, since his would be a substituted basis.

The analogy of the hypothetical situation to the instant case is apparent. In both the *LeGierse* case and in the case of the hypothetical situation, the court treats several transactions as an entire contract for a particular purpose, *i. e.*, in the *LeGierse* case, for the purpose of determining eligibility for the insurance deduction under 302 (g), and in the hypothetical situation, for determining the basis of the stock. However, it is not a necessary concomitant of this proposition that the two contracts must always continue to be one for every and all purposes, and that they cannot be severed by assignment of one of the contracts, as was done in the instant case. If the logic of the *Burr* case and of petitioner's contention, were applied to the hypothetical situation, the value of the common stock would be included in the gross estate.

III.

THE COURT OF APPEALS BELOW CORRECTLY HELD THAT THE ANNUITY PAYMENTS RECEIVED BY THE DECEDENT DID NOT CONSTITUTE INCOME FROM THE LIFE POLICY.

The Court below correctly rejected petitioner's contention that the annuity payments constituted income from the life policy, with the observation "that to state the proposition is to demonstrate its fallacy." (R. 57.) Petitioner's contention disregards the nature and character of the term "income" when that term is used as it is in the pertinent statute in conjunction with "property." In law and in general acceptance, the income from property is the money or property which grows from, is paid for the use of, or otherwise accrues from the property to which it is appurtenant. Profits or income constitute an integral part of the property itself. They are a fruit which grow upon the tree of property, and cease to grow when the tree dies or is destroyed. No concept is more firmly rooted in our law and tradition. *Pollack* v. *Farmer's Loan and Trust Co.*, 157 U. S. 429 (1895).[8] The Supreme Court has defined

8. In holding invalid certain provisions of an 1894 statute imposing an income tax, the court in the *Pollack* case gave exhaustive consideration to the nature of income from property and the relationship thereof to the property from which it was derived. Although the court divided on certain ultimate issues, no dissent was expressed from the proposition that the income from property is an integral part of the property itself. Typical of the many authorities to this effect, quoted with approval, are the following:

Coke upon Littleton: "If a man seized of lands in fee by his deed granteth to another the profit of those lands, to have and to hold to him and his heires, and maketh livery *secundum formam chartae*, the whole land itselfe, doth passe; for what is the land but the profits thereof?" Lib. 1, cap. 1, § 1, p. 4b. (157 U. S. 429, 580, 590.)

Jarman on Wills, Vol. 1, page 740: "* * * a devise of the rents and profits or of the income of land passes the land itself both at law and in equity; a rule, it is said, founded on the feudal law, according to which the whole beneficial interest in the land consisted in the right to take the rents and profits." (157 U. S. 429, 580, 589.)

income as "the gain derived from capital, from labor, or from both combined." *Eisner* v. *Macomber*, 252 U. S. 189 (1920). If there could be any doubt that the term "income" as used in Section 811 (c)(1)(B) contemplates and requires the continued existence of the property to which the income is applicable, such doubt would be immediately dispelled by the other language of the pertinent phrase, *i. e.*, "* * * the possession or enjoyment of, or the right to the income from, the property * * *."

Income in the sense here pertinent, is money received from the use of money or property. If Smith buys corporate stock, he receives income in the form of dividends so long as he holds the stock, but no longer. If Black lends money to White, he receives income in the form of interest so long as White has the use of his money, but no longer. If Smith sells his stock he ceases to receive income therefrom. When Black receives payment of his money, he stops getting interest. But, in the instant case, if the assignees of the life insurance contract had surrendered their contract a year after it was written and received the money invested, decedent would still have been entitled to receive her annuity payments right up to the day of her death. It would follow that the annuity payments did not constitute "income on the money invested in the life insurance contract."[9]

Petitioner's contention is predicated upon the unfounded assumption that the annuity income constitutes the sole income from the total premiums invested in both the life

9. Had they, however, surrendered the life insurance policy, assignees would have ceased to receive the dividends on that contract, and it would have ceased to appreciate in value. These are the elements of income on the life insurance policy, and they were received by and accrued to the benefit of assignees, and not to the decedent.

and annuity contracts. It is not. Actually there are four elements of income:

1. The annuity payments.
2. Dividends on the annuity contract.
3. The dividends on the life policy.
4. The increment in value of the life policy.[10]

Of these four elements of income, the first two were to be received and were received by the decedent; the last two were irrevocably assigned to the respondents and actually received by them.[11]

Actually the annuity payments constituted income only in part, and were comprised principally of repayments of capital. The insurance company required the purchase of the annuity contract as a condition to issuing the life insurance contract without examination. The converse is not true. The company, or any insurance company, would have been glad to issue the annuity contract alone without purchase of the life insurance contract. Physical examination is not required for the purchase of annuity policies, for the obvious reason that physical infirmity of the annuitant renders the contract more attractive to the company. The annuity contract was of the non-refundable type, *i. e.*, no guaranteed aggregate sum was to be paid, and all rights under the contract were to terminate at death no matter how soon that might have occurred. (R. 12, 13.) Hence, the theory of the policy is that part of each

10. This item of income rather than being paid periodically, accrues, after the nature of the accruals of income upon government E bonds, purchased at 75% of face value and redeemable upon demand at some percentage of face value between 75% and 100%, depending upon the time held. The policy itself sets forth the table of increasing surrender values (R. 25), in form, appearance, and computation not too dissimilar from the table appearing on the reverse side of government E bonds, and indicates the basis of computation of the income by way of accrual.

11. The dividends on the life policy were by the respondents reassigned to Virginia E. Bohnen, one of the respondents (R. 16).

payment represents refund of premium and the balance interest thereon, or income.

This is the theory upon which annuity payments are taxed for income tax purposes. Under Section 22 (b) (2) of the Code, annuity payments are treated as income to the extent of three per cent of the consideration or aggregate premiums, and the balance of the payments in excess of that amount are treated as return of capital or investment, until all capital has been recovered. The annuitant in the instant case lived less than seven years after purchase of the contract, and accordingly received only six annual payments. (R. 3, 12.) The allocation under Section 22 (b) (2) is as follows:

Date	Annuity Payments	Allocation		Principal Still to Be Received
	Amount	To Income*	Return of Principal	
				$22,602.96
Oct. 15, 1936....	$1,618.03	$ 678.09	$ 939.94	21,663.02
Oct. 15, 1937....	1,618.03	678.09	939.94	20,723.08
Oct. 15, 1938....	1,618.03	678.09	939.94	19,783.14
Oct. 15, 1939....	1,618.03	678.09	939.94	18,843.20
Oct. 15, 1940....	1,618.03	678.09	939.94	17,903.26
Oct. 15, 1941....	1,618.03	678.09	939.94	16,963.32**
	$9,708.18	$4,068.54	$5,639.64	

* 3% of Premium, *i. e.*, $22,602.96.

** Never recovered, except for such dividends as may have been received on the annuity policy. The record does not indicate the amount of such dividends; hence they cannot be used in the computation.

If petitioner were correct in his contention that the annuity payments constituted income on the total premiums paid for both policies, then under Section 22 (b) (2) three per cent of such total premiums should be treated as income. The Commissioner has asserted this theory in the courts, but without success.[12]

12. *Koehrer* v. *Commissioner*, C. C. H. Dec. 14,408 (M) (Tax Court Memorandum Decision, 1945), relying in part upon *Helvering* v. *Meredith*, 140 F. 2d 973 (C. C. A. 8, 1944). These cases are discussed in Section IV (5) of this brief.

The unsoundness of petitioner's contention that the annuity payments constituted income on both contracts may be tested by a further consideration. The total premiums paid amounted to $76,320, *i. e.*, $53,717.04 on the life policy, and $22,602.96 on the annuity contract. Total sums received from the company were $81,708.18, *i. e.*, $72,000 face value of the life policy and $9,708.18, total annuity payments. Hence total receipts exceeded total investment by $5,388.18. This would, upon petitioner's theory, constitute total "income" on the investment, and yet decedent received aggregate annuity payments of $9,708.18. It is thus clear that the annuity payments were not restricted to "income." Hence, they must have consisted of "income" and "principal." Since the annuity contract was and would have been issued independently of the life policy, and was so computed actuarily, it is clear that the annuity payments constituted income and principal on the annuity contract above.[13]

IV.

THE CASE OF BURR v. COMMISSIONER, 156 F. 2d 871, WAS ERRONEOUSLY DECIDED, AS WERE ESTATE OF REYNOLDS v. COMMISSIONER, 45 B. T. A. 44, WHICH PRECEDED IT, AND CONWAY v. GLENN, 139 F. 2d 965, WHICH FOLLOWED IT.

It should be noted at the outset that the Court of Appeals for the Second Circuit, with two of the same judges participating who decided the *Burr* case, has recently rendered a decision which casts grave doubt on the reasoning of the *Burr* case. In *Commissioner* v. *Twogood's Estate*,

13. It is true that dividends were paid both on the annuity contract and on the life policy, the former to decedent, the latter to the assignees and owners of the life policy. Such dividends were, however, independent of the actuarial computations. Anyway, the dividends on the life policy would obviously exceed those on the annuity policy because of the higher premium reserve, and face value of the life policy (R. 14, 15, 23, 25).

194 F. 2d 627 (C. A. 2d, 1952), the decedent had been the beneficiary of a company retirement plan under which he could, and did, elect to reduce the annual payments to be received by him in order to provide for the payment of an annuity to his wife after his death. The Commissioner added to the value of the decendant's gross estate an amount equal to the value at the decendent's death of the annuity payable to his wife. In the Court of Appeals the Commissioner's sole contention was that the value of the annuity payable to the decedent's wife was includible in his gross estate on the theory that he had made a transfer of property under which he retained for his life the possession or enjoyment of, or the right to, the income from the property. The Court rejected the Commissioner's contention, and held that no life interest was retained by the decedent in what his wife received by his election under the plan. The Court said that to meet the requirements for includibility in the decedent's estate under Section 811 (c)(1)(B) "there must be some causal relationship between the property transferred and the payments received by the transferor * * *." (194 F. 2d at 629.) It is difficult to understand how the same court which failed to find such a causal relationship in the *Twogood* case, could have believed that there was one in the *Burr* case.

It is submitted that the erroneous decision reached in the *Burr* case (and in the other two cases cited) resulted from the following principal errors and misconceptions:

(1) The Court misconceived the holding and scope of *Helvering* v. *LeGierse*, 312 U. S. 531, and subordinated substance to form.

(2) The Court focused attention upon the relationship between the decedent and a third party, *i. e.*, the insurance company, to the exclusion of the determinative and significant relationship between the decedent and the transferee.

(3) The Court misconceived the factual situation of, holdings in, and significance of *Commissioner* v. *Clise*, 122 F. 2d 998 (C. A. 9, 1941) and *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281 (C. A. 5, 1941).

(4) The Court ignored the distinction between transfers "intended to take effect in possession at or after his death" and "transfers under which he has retained for his life * * * the possession or enjoyment of or the right to the income from the property," and disregarded also the theory and purpose of imposing an estate tax upon *inter vivos* transfers.

(5) The Court erred in concluding that the annuity payments constituted the income from the combined premiums.

(1) In Burr v. Commissioner, 156 F. 2d 871, the Court Misconceived the Holding and Scope of Helvering v. LeGierse, 312 U. S. 531, and Subordinated Substance to Form.

In the *LeGierse* case the decedent had purchased both an annuity and life insurance policy on her own life, naming her daughter as beneficiary. Decedent was eighty years old at the time, and the life insurance policy would not have been issued, but for the purchase of the annuity contract. All rights of ownership, in both the annuity contract and the life insurance policy, were retained by the decedent until the time of her death.

The court held that the life insurance policy did not constitute insurance within the purview of Section 302 (g)[14] so as to entitle the estate to the $40,000 deduction

14. Prior to amendment in 1942, Sec. 811 (g), formerly 302 (g) read as follows:

"(g) Proceeds of Life Insurance.—To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

for insurance therein provided; and that the proceeds of the insurance policy were "taxable under Section 302 (c) of the Revenue Act of 1926 as amended as a transfer to take effect in possession or enjoyment at or after death."

In the *Burr* case the essential factual situation was the same as in the *LeGierse* case, except that the decedent, subsequent to purchase thereof, assigned ownership of the life policies (here there were several policies) to his sons. The Second Circuit Court of Appeals held that upon the death of the decedent, the proceeds of the insurance policies transferred *inter vivos* constituted "transferring a remainder while retaining a life interest—or in the terms of the statute—retaining the enjoyment or the right to the income from the property."

The court's position in the *Burr* case would seem to be that in the *LeGierse* case, the Supreme Court has laid down the broad proposition that in any annuity-single premium life insurance policy situation where decedent has paid the premiums, the proceeds of the life policy are *ipso facto* includible in decedent's estate, irrespective of what decedent may have done subsequently with the life policy. The following language is pertinent (p. 871):

> "The two purchases were obviously a single transaction, the annuity premium being part of the consideration for the insurance policies. Unless differentiated because of the subsequent assignment, therefore, the case is squarely within the Supreme Court's decision in *Helvering* v. *LeGierse*, 312 U. S. 531, 61 S. Ct. 646, 85 L. Ed. 996, holding the proceeds of the policies taxable under § 811 (c)."

The *LeGierse* case does not support this proposition at all. In that case, the taxpayer never seriously denied that the proceeds of the life insurance policy were includible in the gross estate "as a transfer to take effect in possession or enjoyment at or after death." Certainly, he

could not seriously have taken such a position in view of the fact that the beneficiary acquired no right, title or interest whatever in the policy or its proceeds until the death of the insured. The only real question before the court was as to whether or not the life insurance policy constituted "insurance" within the purview of Section 302 (g). The Court held only that the two contracts as written and as they remained throughout the life of the decedent (no change in their status having ever been made) constituted one contract, did not involve an "insurance risk," and did not qualify for the special statutory deduction in Section 302 (g). The court itself states the issue of the case at follows (p. 538): "Thus the basic question is whether the amounts received here are amounts 'receivable as insurance' within the meaning of § 302 (g)."

(2) In Burr v. Commissioner, 156 F. 2d 871, the Court Focused Attention Upon the Relationship Between the Decedent and a Third Party, i. e., the Insurance Company, to the Exclusion of the Determinative and Significant Relationship Between the Decedent and the Transferee.

It is believed that the treatment accorded by the court in the *Burr* case to the relationship between the three parties, *i. e.*, the decedent, the transferee, and the insurance company, is deserving of comment and is indicative of a misconception on the part of the court regarding the ultimate problem. The following language from the opinion is deemed pertinent:

> "When the decedent in this case transferred $107,500 to the insurance company, he obtained from it two promises: one to pay him a small rate of return in the form of monthly annuity payments, the other to transfer $100,000 to the named beneficiaries on his death. His annuity payments represented a fixed per-

centage of the total consideration; and the company investment risk was so calculated as never to exceed the expected income from the premiums on the insurance and the annuities. * * *

"Had the sons actually cashed the insurance policies, the contracts would have been separated and the insurance company would then have had to make annuity payments out of income and capital from the annuity premium. See Meisenholder, Taxation of Annuity Contracts under Estate and Inheritance Taxes, 29 Mich. L. Rev. 856, 884; 42 Col. L. Rev. 162, 165. But they chose not to surrender them; and the unexercised power to do so did not change the factual realities of the transaction. While the power was unexercised, the investment was analogous to a simple annuity with principal payable at death, a transfer which—even when irrevocable—is taxable under § 811 (c). *C. I. R.* v. *Wilder's Estate*, 5 Cir., 118 F. 2d 281, certiorari denied *Wilder's Estate* v. *C. I. R.*, 314 U. S. 634, 62 S. Ct. 67, 86 L. Ed. 509." [156 F. 2d 871, 872.]

Apparently the court's attitude is that if the transferees had surrendered the life insurance policy, and collected the cash surrender value, then no sums would have been taxable to or included in the gross estate of the decedent by virtue of the original transfer; this despite the fact that such surrender of the policy would neither have affected the relationship between the decedent and the insurance company, nor that between the decedent and the transferee. The only relationship which possibly could have been affected would have been that between the transferee and the insurance company.

The language of Section 811 (c) upon which the court predicates liability refers to a transfer of property in which the decedent has reserved the income for life. It is extremely difficult to see how a subsequent transaction between the transferee and a third party, the insurance company, after a complete and irrevocable assignment of

the policy to the beneficiary, with no reversionary or other interest of any type reserved to the decedent, can possibly affect the question of whether or not the decedent has reserved income for life.

It must be remembered that the basis for asserted liability is that the annuity payments constitute the "income" upon both policies since the decedent made no further transactions after the irrevocable assignment of the life insurance policy, and did nothing further whatever to change the status of the contracts, or of his rights. It would seem that he either had or had not reserved the income on the life insurance policy at the time the irrevocable assignment was made.

The reason the court has assumed an illogical position on this point is that it has started out with a highly untenable premise. The obviously untenable premise is that the decedent has retained the income from a contract when he has in fact made a complete assignment of that contract without any reservation of rights whatever.

Recalling the court's attention to the hypothetical situation set forth above,[15] it would seem equally logical to hold that the value of the common stock transferred to decedent's son should be included in decedent's gross estate, if his son retained the stock at the time of decedent's death, but otherwise, if the son resold the stock prior to decedent's death. Certainly it is difficult to believe that it was the intention of Congress or of the Supreme Court that taxability should hinge upon such highly artificial and irrelevant considerations.

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15. *I. e.*, the purchase in a single transaction of preferred stock as a condition to purchase of common stock, and subsequent gift of the common stock to decedent's son (Section I of Argument).

(3) In Burr v. Commissioner, 156 F. 2d 871, the Court Misconceived the Factual Situation of, Holdings in, and Significance of Commissioner v. Clise, 122 F. 2d 998 (C. A. 9, 1941) and Commissioner v. Wilder's Estate, 118 F. 2d 231 (C. A. 5, 1941).

In the *Burr* case the court apparently rested its decision upon the authority of the *Clise* and *Wilder's* cases. These cases seem to the respondents to have been correctly decided, but not to support the *Burr* case, because they involve an entirely different problem. In the *Clise* case, two types of problems were presented: one with reference to the purchase of life and annuity policies; the other with reference to joint and survivor annuity contracts.

The first problem involved policies of the type of the instant case, except that in the *Clise* case the annuity and life policies were retained by the decedent throughout her lifetime. The court held on the authority of the *LeGierse* case, that the proceeds of the policies were includible in the gross estate under Section 302 (c) of the Revenue Act of 1926. That portion of the case was substantially identical with the situation of the *LeGierse* case, and certainly the court could have reached no other conclusion. The real controversy in the case dealt with the other policies involved.

In each of sixteen joint and survivor annuity contracts decedent had named herself as primary annuitant, and some other person as a second annuitant to receive the annuity after her death, and until the second annuitant's death. The question with reference to these contracts was simply whether or not their value at the time of decedent's death should be included in her gross estate under Section 302 (c). It is interesting to note that in the determination of this question, the court made no reference whatever to the *LeGierse* case, despite the fact that the court had relied

upon it in connection with the annuity-life policy problem. This is quite significant, indicating as it does a proposition which should be self-evident, *i. e.*, that the *LeGierse* case is applicable only to the question of whether or not a single contract exists with reference to Section 302 (g), and not with reference to the includibility of the proceeds of a policy under Section 302 (c) (now 811 (c).) The court held that the value of the policies at the time of death was includible in the gross estate, and predicated liability squarely upon the joint resolution of March 3, 1931.[16] The following language is particularly pertinent (p. 1003):

> "Unquestionably, Mrs. Clise, the first annuitant, reserved to herself the enjoyment—the economic benefit, of these contracts, during her lifetime. This is true, just as surely as though she had created a trust fund with her property—money, and reserved to herself a certain sum annually, to be paid out of income and corpus, with the remainder over. Mrs. Clise reserved to herself the complete enjoyment of her property, during her lifetime, to the extent she desired to enjoy it, relieved of the worry and cares of management, and guaranteed an estate to the objects of her bounty after her death. It is clear, therefore, that Mrs. Clise retained to herself the economic benefits of her property during her lifetime."

It may be assumed that in the *Clise* case, the rights of the second annuitant were vested, and that the decedent could not have defeated those rights by surrender of the policy, and certainly not by designating another secondary annui-

16. Following the holding in *May* v. *Heiner*, 281 U. S. 238 (1930), and other decisions cited below, holding the existing statute inapplicable to transfers with reserved life interests, the joint resolution of March 3, 1931 added to Section 302 (c) now 811 (c), the following language:

> "including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income thereof;"

tant, since the premium was determined by reference to the ages of the two annuitants. However, the situation presented there was clearly one where the decedent had reserved the life income from the very property in question. There not only was only a single contract originally, but there was not and could not have been a division of that contract, or any way in which the policy or any part or share of it could have been surrendered without interfering with or obliterating the life interest and enjoyment of the decedent. Attention is invited to the court's own language (p. 1003):

> "* * * so long as Mrs. Clise lived, it was impossible for the second annuitants to possess or enjoy the economic benefits of the transfer and until Mrs. Clise's death it was not an absolute certainty that any one of the second annuitants would survive her. The death of the first annuitant, then, was the generating event."

This situation truly fits into the intendment of the clauses of Section 811 (c) dealing with a transfer in which the decedent has reserved the income for life. Certainly this is not the situation of the instant case wherein the transferees could have surrendered and realized upon the value of their contract without in any way interfering with the enjoyment of the income of the decedent.

The *Wilder's Estate* case was substantially identical in all particulars with the joint and survivor annuity situation in the *Clise* case. Although the court was somewhat indefinite as to which clause of Section 811 (c) liability should be predicated upon, it seemed to incline toward the clause concerning transfers "in contemplation of, or intended to take effect in possession or enjoyment at or after his death."

(4) In Burr v. Commissioner, 156 F. 2d 871, the Court Ignored the Distinction Between Transfers "Intended to Take Effect in Possession At or After His Death" and "Transfers Under Which He Has Retained for His Life * * * the Possession or Enjoyment of or the Right to the Income from the Property," and Disregarded Also the Theory and Purpose of Imposing an Estate Tax Upon Inter Vivos Transfers.

The court's misconception of the scope and holding of the *LeGierse* case affected its entire approach to the problem. It assumed that it was dealing merely with a minor variation of a situation already adjudicated in the *LeGierse* case, *i. e.*, "unless differentiated because of the subsequent assignment." This is a curious approach when dealing with a statute the gist of which is the assignment, or "transfer," particularly when one recalls that in *LeGierse*, the taxpayer conceded that the proceeds of the insurance policy were includible, and was merely asking for a deduction therefrom under Section 302 (g). In the *Burr* case, the question of includibility was the ultimate problem.

In the *LeGierse* case includibility was concededly predicated upon the theory of a transfer taking effect in possession or enjoyment at death. The clause dealing with *inter vivos* transfers in which an interest is reserved was obviously inapplicable, since in that case no transfer had ever been made.[17]

17. In *Commissioner* v. *Clise*, 122 F. 2d 998, liability was predicated upon the latter clause, *i. e.*, transfer (the irrevocable designation of the second annuitant) with a reservation of income (the annuity payments). In *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281, the court was somewhat undecided, apparently feeling that the facts could be brought under either clause, but inclining toward the former, *i. e.*, a gift to take effect in possession or enjoyment at death. In the *Burr* case, however, the court, although ostensibly following the *LeGierse* case, predicated liability upon a different clause entirely from that applicable to the *LeGierse* case, without any apparent recognition of the fact that it had shifted

It is believed that the failure of the court to recognize the distinctive character of these two types of clauses is indicative of its superficial treatment of the entire problem of includibility. Further evidence of such superficiality is the following observation of the court (156 F. 2d 871, 872):

> "While the power [to surrender the life policy] was unexercised, the investment was analogous to a simple annuity with principal payable at death, a transfer which—even when irrevocable—is taxable under § 811 (c)."

A moment's reflection indicates the fallacy of such a con-

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the statutory basis for its holding and without one word of explanation therefor.

A sharp distinction has been recognized between these two types of clauses by both the Supreme Court and Congress, since the holding in *May* v. *Heiner*, 281 U. S. 238 (1930), that property transferred *inter vivos* with a reserved life estate was not includible as a transfer intended to take effect at death. Subsequent to that decision, the latter clause was introduced by the Joint Resolution of March 3, 1931, and further clarified and expanded under the Revenue Act of 1932. The Joint Resolution added to Section 302 (c), now 811 (c), the following language: "including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income thereof; * * *." The language of the Joint Resolution of March 3, 1931 was revised by Section 803 (a) of the Revenue Act of 1932 to read as follows: "or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; * * *."

The added clauses were subsequently held to be prospective only in their operation. *Hassett* v. *Welch*, 303 U. S. 302 (1938). The cycle has now apparently been closed by the decision in *Commissioner* v. *Church's Estate*, 335 U. S. 632 (1949), in which the Supreme Court repudiated *May* v. *Heiner*. For the period between the date of the Joint Resolution of March 3, 1931, and the decision in the *Church* case, however, the separate character and operation of the two clauses was recognized, and it was, of course, within that period that all of the facts of the instant case arose.

clusion in view of the fact that under a "simple annuity", the annuitant is unable to collect the principal from the insurance company and still continue to receive the annuity payments, whereas in the instant situation collection of the cash surrender value of the life policy would not affect the annuity policy in the slightest.

It would seem clear that the dominant purpose of the statutory provisions of 811 (c), as well as those of 811 (d) (dealing with revocable trusts) is to prevent avoidance of the estate tax. *Paul, Federal Estate and Gift Taxation*, § 7.04 and cases cited therein. Under relevant provisions of 811 (c), in order for a transfer to be taxable, the transfer must either be a substitution for a testamentary disposition, or death must bring about a shift in economic interest. *Op. cit.* § 7.05 and authorities cited. The following language of Mr. Justice Frankfurter, used with reference to a state inheritance tax matter, in *Whitney* v. *Tax Commission*, 309 U. S. 530, 538 (1940), is illustrative:

> "In making this diversion ['to the purposes of the community of a portion of the total current of wealth released by death'] the state is not confined to that kind of wealth which was, in colloquial language, 'owned' by a decedent before death, nor even to that over which he had an unrestricted power of testamentary disposition. It is enough that one person acquires economic interests in property through the death of another person, even though such acquisition is in part the automatic consequence of death or related to the decedent merely because of his power to designate to whom and in what proportions among a restricted class the benefits shall fall.
>
> "The books are replete with recognition of these general principles. Thus the full value of property may be taxed as part of a decedent's gross estate even though held by him merely as a tenant by the entirety, *Tyler* v. *United States*, 281 U. S. 497; likewise the full value of property in which the decedent was only a

joint tenant may be taxed in his estate, *United States* v. *Jacobs*, 306 U. S. 363. In neither of these instances was there an exact equation between the 'beneficial interest' owned by the decedent just before his death and that by which the tax was measured. Again, this Court found no difficulty in sustaining a tax on the transfer of property conveyed in trust by a decedent during his life, although he had divested himself of all beneficial interest in the corpus and had only reserved the power to change the beneficiaries excluding, however, himself and his estate from the range of choice. *Porter* v. *Commissioner*, 288 U. S. 436. The attempt to differentiate the tie that binds these cases by treating the *inter vivos* transfers in these decisions as mere substitutions for testamentary dispositions, disregards the emphasis in these cases on the practical effect of death in bringing about a shift in economic interest, and the power of the legislature to fasten on that shift as the occasion for a tax. This broader base is emphasized, for instance, by the fact that in the *Porter* case the decedent had divested himself of all 'beneficial interest' in the trust property prior to the passage of the taxing act by which the trust was included in the value of his gross estate."

It may be said in general that all of the transfers referred to in the relevant provisions of Section 811 (c), except those involving the reservation of a life interest or income, are taxable on the theory of a shifting of economic interest by death.

Transfers made includible because of the reservation of a life interest or income in the decedent, are taxable as a substitute for a testamentary disposition. It becomes quite pertinent to inquire why transfers under this clause are deemed of a testamentary character. It would seem that all such transfers have the following elements in common, *i. e.*, that the transferor desires to place his property in a position where the transferee will have the ownership, possession and enjoyment of the property upon his death, but neverthe-

less wants to continue to have the use of the property during his life. Accordingly, in each instance the transferor has made some special arrangement with reference to the property transferred under which the freedom of the transferee in dealing with the property has for all practical purposes been substantially circumscribed and limited. Thus, for example, although from a technical property point of view, a remainderman can sell real estate which is subject to a reserved life estate, practically there is no market for such real estate at a price even approximating the actual value thereof. In the case of personalty, such arrangement usually takes the form of a trust, and here again even in the absence of a spendthrift provision, although technically the beneficiary can sell and assign his interest, there is practically no market for such interests.[18] These basic elements may be summarized as follows:

(a) Transferee has received irrevocable interest *inter vivos*.

(b) Transferee will come into enjoyment of property after transferor's death.

(c) Transferor will have enjoyment until his death.

(d) Transferee's enjoyment is postponed until death of transferor for the purpose of enabling transferor to retain enjoyment until his death.

18. The absence of a market for such remainder interests is not only a matter of common knowledge, but has been judicially recognized, *e. g.*, *Mechling* v. *Meyers*, 284 Ill. 484 (1918), in which the Illinois Supreme Court gave the Illinois partition statute an admittedly strained construction in order to obviate partition of a remainder interest. The court said (p. 490):

"If the statute is to be construed as giving a right to compel a sale of a remainder after a life estate, where a purchaser cannot know whether he will get possession of his property in his lifetime or not and the interests of other owners will be sacrificed, a speculator may obtain for a trifling consideration the interest of a needy remainder-man, file a bill for partition of property that cannot be partitioned and practically destroy the other interests. Every sentiment of right and justice rebels against a construction of the statute which would permit such a result."

(c) The arrangement or device employed of necessity so entails the property transferred that transferee is precluded from dealing with it for his own benefit, prior to the death of the transferor.

How does the transfer of the insurance policy in the instant suit stand in the light of such tests? It is undisputed that the assignees of the insurance policy had a ready market for their property at any time by the simple device of surrendering the same to the insurance company at a price commensurate with its then value based mathematically upon investment and actuarial principles.

Was the arrangement made for the purpose of enabling transferor to retain benefits during his life? The only possible benefit reserved to the transferor upon the court's theory was the annuity payments which he was to receive upon the annuity contract. While it is true that the life insurance policy would not be sold without the annuity policy, the converse concededly is not true. The insurance company, or any other company, would have been happy to sell the decedent the annuity policy upon the same terms and yielding the same income for the same premium and thereby securing to the decedent the same benefits, without requiring the purchase of life insurance.

If the petitioner contends that the elements which we have cited as being common to all cases falling within this clause of 811 (c) are not present, then it would seem incumbent upon the government to point out to the court cases where the clause has been applied where such elements have not characterized the facts. We are confident that there are no such cases, other than the erroneous cases here complained of dealing with the present situation.

It is true that many arrangements are entered into where the immediate enjoyment of all or a part of the transferred property is withheld from the beneficiary, where these ele-

ments are not present, as in the case of the creation of many trusts in which no life interest or reversionary interest is reserved to the settlor. In these cases, however, the property is entailed for the protection of the beneficiary, and not for that of the transferor, and in such cases the disposition is not deemed testamentary and the property is not includible under 811 (c).

The fact cannot be too strongly emphasized that the transfer in the instant case falls within neither the letter, the spirit, nor the purpose of Section 811 (c). The transfer was of a life insurance policy. No income was reserved from this policy. The only income resulting from this policy were the dividends provided for therein, and the right to the appreciation in the value thereof, the right to receive both of which was specifically assigned with the policy. There was no "shift of economic interest" by reason of or at the death of decedent, since all such interest had passed irrevocably to the transferees at the time the policy was assigned. There was no entailment of this policy in any way for the benefit of the decedent, nor did the decedent have any "string" by way of possibility of reverter or otherwise on this policy.

(5) In Burr v. Commissioner, 156 F. 2d 871, the Court Erred in Concluding That the Annuity Payments Constituted the Income from the Combined Premiums.

In the *Burr* case the court used the following language (p. 872):

> "When the decedent in this case transferred $107,500 to the insurance company, he obtained from it two promises: one to pay him a small rate of return in the form of monthly annuity payments, the other to transfer $100,000 to the named beneficiaries on his death. His annuity payments represented a fixed percentage of the total consideration; and the company's

> investment risk was so calculated as never to exceed the expected income from the premiums on the insurance and the annuities. See *C.I.R.* v. *Keller's Estate, supra*, 3 Cir., 113 F. 2d 833, 834, 836."

Apparently the court concludes that since the "annuity" payments represented a fixed percentage of the total consideration, the total consideration being the premiums for both policies, it necessarily follows that the annuity payments constitute income upon both policies.

This is a curiously illogical conclusion. The annuity payments are all alike, and the amount of the total consideration is necessarily liquidated. Since identical payments must always constitute a "fixed percentage" of any liquidated amount, such mathematical phenomena can hardly be determinative of the instant problem. The annuity payments also constituted a "fixed percentage" of the consideration for the annuity alone, or, for that matter, of the national debt on the day the *Burr* case was decided.

In *Commissioner* v. *Keller's Estate*, 113 F. 2d 833 (1940), cited as authority in the above quotation, the court, having a case identical with the *LeGierse* case made a careful consideration of the underwriting factors underlying life insurance and annuity policies and concluded that the use of the device employed in the *LeGierse* case, and in the instant case, *i. e.*, of the insurance company protecting itself against the hazard of uninsurability by requiring an annuity policy in a specific minimum amount, did convert what would otherwise have been an insurance risk into an investment risk. The court even set forth in an appendix actuarial formulae demonstrating its conclusion. In the *Keller* case, however, there was no such conclusion reached as that reached in the *Burr* case upon the supposed authority of the *Keller* case. The misconception of the *Keller* case by the court in the *Burr* case is part and parcel of

its general misconception of the scope and holding of the *LeGierse* case.

Let us examine briefly the conclusion reached by the court in the *Burr* case, *i. e.*, that the annuity payments constituted income from both policies. Let us assume, as the court does, that the total consideration, *i. e.*, the premiums for both policies constitutes one lump sum. Consonant with the court's major premise based on the *LeGierse* case, the arrangement does not constitute insurance, but "investment." As indicated in Section I of this brief, the income which the insurance company agreed to pay upon this aggregate investment is not limited to the annuity payments, but is made up of three separate elements: (1) The annuity payments, (2) dividends upon the life insurance policy, and (3) proportionate increase in the value of the life insurance policy as the life expectancy is gradually exhausted.[19] In both the *Burr* case and the instant case, it is conceded that the dividends payable on the life insurance policy were covered by the assignment to the beneficiaries and payable to and received by them.

A study of actuarial formulae and principles (even to the extent that they are set out in the appendix referred to in the *Keller* case) will indicate that the income existing in the form of increase in value of the cash surrender value of a life policy is equal to the aggregate amount of the annuity payments. This is precisely the reason that the courts have held that such an arrangement does not constitute insurance but an investment risk.

Of the four types of income payable on the original aggregate consideration, it is obvious that in the *Burr* case and in the instant case, only the first two types, *i. e.*, the annuity payments, and the dividends on the annuity policy

19. Analogous to government "E" bonds, purchased at $75, worth $100 at maturity, and gradually increasing in value during the ten year period preceding maturity.

were retained by the decedent, and that the balance of the income was assigned to and payable to the beneficiaries.

It should be noted also that even the annuity payments received by the decedent consisted only in part of "income" and that the major part of such payments consisted of return of capital. Under the provisions of Section 22 (b)(2) of the Code, the decedent treated only three per cent of the total annuity premium as income, and excluded the balance as return of capital. The annuity premium was $22,602.96. (R. 7, 8). Hence, three per cent of this, or only $678.09, constituted income to the decedent each year under the statute. The annuity payments were $1,618.03. (R. 7, 8.) Hence, the balance of $939.94 constituted return of capital. The premium on the life insurance policy was $53,717.04. (R. 7, 8.) The total premiums for both policies were $76,320. Under the petitioner's theory, the $678.09 income received by the decedent constituted the total income on an investment of $76,320, or a rate of return of less than one per cent. Respondents submit that this constitutes a *reductio ad absurdum* of the petitioner's argument.

A similar analysis may be made of the petitioner's statement (Pet. Br. 4, 5) that the effect of the purchase of a life insurance policy and an annuity policy is "that the decedent invested a sum with the insurance company, consisting of the net amount of the premiums, she became entitled to the income from the investment in the form of annual payments for the period of her life, and her children, to whom she had assigned the life policy, received the principal amount at her death." This statement is simply contrary to fact, for it ignores the fact that if the decedent, the annuitant, should die before recovering through annuity payments the premium paid for the policy, the unpaid balance (the "corpus" of the annuity policy) would not be paid to the beneficiaries of the life insur-

ance policy, but would remain the property of the insurance company. It is thus apparent that, just as the annuitant's income is not based on the premium paid for the life insurance policy, so the amount payable to the beneficiaries of the life insurance policy is not based on the premium paid for the annuity policy.

It may be pertinent at this point to call attention to Section 81.18 of the Estate Tax Regulations, 105, which, referring to and implementing Section 811 (c), provides in pertinent part as follows:

> "If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate."

If it be assumed *arguendo* that the position of the court in the *Burr* case and of the petitioner is correct in other particulars the decision reached by the courts below would have resulted anyway from the application of Section 81.18. (This matter is discussed in detail in the next succeeding section of this brief.)

It should be noted also that under Section 22 (b)(2) of the Internal Revenue Code, the method of computing income tax upon annuity payments is to treat such payments as income to the extent of three per cent of the aggregate premiums, or consideration, and to exclude the balance as return of capital until such time as all capital has been recovered. If the position of the court in the *Burr* case, and of the petitioner in the instant case, is sound, then it would seem to follow that the premiums paid upon both types of policies constitute the "aggregate premiums or consideration paid," with the result that a larger share of the annual payments to the annuitant would be reportable by him as income.

The petitioner seems to have taken this position unsuccessfully in *Kochrer* v. *Commissioner*, C. C. H. Dec. 14,408 (M) (Tax Court Memorandum Decision, 1945), by assessing a deficiency against an annuitant who had reported annuity income in the usual manner and asserting that the full amount of annuity income was reportable. In this case the taxpayer, the annuitant, had purchased two sets of single premium life insurance policies and annuity policies. He paid the following premiums on these policies:

Life Policy	Annuity Policy	Total Premiums
$39,296.50	$13,703.50	$53,000
7,984.70	2,515.30	10,500

During each of the two taxable years involved, the taxpayer received $1,249.80 in income from one policy, and $232.44 from the other, or a total income from these sources of $1,482.24. He reported as income from these sources for each year the sum of $486.56, computed as three per cent of the total annuity premiums of $13,703.50 and $2,515.30. In assessing a deficiency, the government included the total sum of $1,482.24 in the taxpayer's income for each year. Although the basis for the government's action was not made clear, it would seem to have been that the annuity income was reportable in full because it was less than $1,905.00, which is three per cent of $63,500, the total life insurance and annuity premiums. The court upheld the taxpayer, relying in part on *Helvering* v. *Meredith*, 140 F. 2d 973 (C. C. A. 8, 1944) which affirmed the decision of the Tax Court in *Meredith* v. *Commissioner*, C. C. H. Dec. 13,097 (M) (Tax Court Memorandum Decision, 1943). In the *Meredith* case the government had asserted that single premium life insurance policies and annuity contracts, when purchased together, constitute a single investment for the purpose of taxing as ordinary income to the in-

sured both the total annual payments to her from the annuity contract and the dividends paid to her on the life insurance policies. The court held that the transaction constituted the purchase of two separate contracts, the annuity payments being taxed according to the usual rule, and the dividends on the life policies being non-taxable until they exceed the aggregate premiums paid thereon.

It is submitted that the observations in this subparagraph set forth demonstrate further that the position reached in the *Burr* case and asserted by the petitioner in the instant case, is not only a sharp deviation from the applicable statute and cases, but is not consonant with treasury regulations and practice.

V.

THE ESTATE TAX REGULATIONS WITH REFERENCE TO APPORTIONMENT SUPPORT THE DECISION OF THE COURT OF APPEALS BELOW.

In his brief (Pet. Br. 5, 22, and 23) petitioner refers to an argument made by respondents below in connection with the provisions of Section 81.18 of the Estate Tax Regulations, 105, which, referring to and implementing Section 811 (c), provide in pertinent part as follows:

> "If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate."

Petitioner apparently misunderstands this argument, and assumes that respondents were asking the court below to make an apportionment in accordance with those provisions, and indicates to the court that respondents are thus asking for relief upon an issue not properly before the

court, because the facts necessary to such apportionme
do not appear in the record. This was not the object
the argument at all. Respondents referred, and now ref
to the quoted section of the Regulations for the purpose
indicating that the application of such section leads to p
cisely the results already reached in the courts below. T
facts pertinent to this argument are in the record.

In the instant case the apportionment referred to in t
Regulations has already been made. The apportionme
was specified in the contracts themselves, upon mathema
cal and actuarial principles of general use and acceptati
principles which the petitioner has not and cannot ass
and which would be accepted in any litigation regardi
such question of apportionment. Under this apporti
ment, the annuity payments, together with the dividen
on the annuity policy, include all of the income alloca
to the annuity premium, whereas the dividends on the l
insurance policy, together with the appreciation in val
thereof, constitute the income upon the life insuran
premium. Hence, it is clear that application of Secti
81.18 of the Regulations leads to precisely the res
reached in the courts below, namely, that decedent reserv
no income with reference to the life insurance policy, a
that no portion of the proceeds of such policy are includi
under Section 811 (c)(1)(B).

This argument was made below and is restated here,
well as the argument based upon Section 22 (b)(2) of t
Internal Revenue Code[20] for the purpose also of demo
strating that the position of the petitioner is in confli
with other provisions of the statute and regulations, a
with common practice pertaining thereto.

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20. Discussed at length in the last preceding section of the bri
i. e., Section IV (5).

CONCLUSION.

As applied to the instant case, the meaning of Section 811 (c)(1)(B) is clear. That section was designed to prevent tax avoidance. The instant case falls within neither the letter nor the spirit of its language. The attempt of the petitioner to bring the facts of the instant case within the intendment of that language is neither realistic nor logical. The cases have enunciated a mandate subordinating form to substance and prohibiting consideration of artificial or technical devices of conveyancing with regard to that section. *Helvering* v. *Hallock*, 309 U. S. 106 (1940). Certainly the Supreme Court intended the government as well as the taxpayer to be bound by that same mandate.

It is respectfully requested that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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April 21, 1953.

APPENDIX.

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * *

(c) [as amended by Section 7 (a) of the Act of October 25, 1949, c. 720, 63 Stat. 891] *Transfers in Contemplation of, or Taking Effect at, Death*—

(1) *General Rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

* * *

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; or

(C) intended to take effect in possession or enjoyment at or after his death.

* * *

(26 U. S. C. 1946, ed., Supp. III, Sec. 811.)

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 566

CARTER H. HARRISON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

EDWIN J. BOHNEN, EXECUTOR OF THE ESTATE OF MARY A. BOHNEN, AND INDIVIDUALLY; THEODORE B. BOHNEN AND VIRGINIA BOHNEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

An analysis of the taxpayers' arguments makes it apparent, despite repeated protestations to the contrary, that this Court is being asked to repudiate the rationale of *Helvering* v. *LeGierse*, 312 U. S. 531, and its companion cases.

To support their ultimate contention that the decedent did not make a transfer with a retained life income that is taxable under Code Section 811 (c) (1) (B), the taxpayers start with an unstated assumption, either that the two contracts

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were always completely separate or else that, by assigning the life policy to her children, the decedent effectuated a severance of her single investment with the insurance company. (Br. 16, 18.) There were, it is argued, two separate contracts with the insurance company—the life policy, to which full ownership, including the right to any income, had been transferred to the children (Br. 20–21, 39, 41), and an annuity contract, under which the payments to the decedent were true annuity payments, consisting partially of income and partially of returns of capital (Br. 7, 20–23, 39–45, 46). These two contracts, in the taxpayers' view, are so completely unrelated that, if the decedent dies prematurely, the unpaid principal (which the taxpayers conceive as remaining under the separate annuity contract) redounds, not to the benefit of the holders of the life policy, but to the exclusive benefit of the insurance company. (Br. 42–43.) The extra sum which the insurance company must pay to the holders of the life policy (which the taxpayers, at another point (Br. 41) recognize to be equal to the alleged unused corpus of the annuity fund) is, then, supposed to come from some other, unrelated source.

1. Since these assumptions are flatly contradicted by this Court's holding in *LeGierse,* it seems appropriate to analyze that case in the light of the taxpayers' explanation of the similar transaction here involved.

The reason the life policy in *LeGierse* was held not to be true "insurance" under the predecessor of Code Section 811 (g) is that there was no group sharing of the risk of premature death (p. 540), since the company, by requiring the purchase of the non-refundable annuity contract, always possessed a fund (consisting of the two premiums) more than sufficient to pay the face amount of the life policy no matter when death occurred (pp. 541–542). The excess of the fund over the face amount of the life policy financed loading and other similar charges. Several important conclusions must be drawn from *LeGierse*, each of which is contrary to the taxpayers' basic assumptions. Together, they demonstrate the invalidity of the taxpayers' ultimate contention.

(a) No "insurance" was involved in *LeGierse* because what was paid at death originated, not with insurance reserves contributed by other policy holders, but with the combined premiums originally furnished by the decedent. While it was recognized (p. 537) that the premiums were calculated separately, and that the company maintained separate reserves for each type of contract so that, on the company's books, it would appear that the death payment came out of ordinary life insurance reserves, *LeGierse* looked through these forms to decide that the substance of the matter was altogether different. No matter what the bookkeeping entries of the company, there was

never any true insurance risk, since the net effect of the transaction was the same as an investment of a single fund equal (exclusive of loading factor) to what was to be paid at death.

The taxpayers, quite clearly, are wrong in assuming that the two contracts are to be considered, within the purview of the estate tax, as having the separate characteristics common to annuities and life insurance policies. For example, the assumption (Resp. Br. 42–43) that, on death, the unexhausted premium paid for the annuity contract would not be paid to the holders of the life policy, "but would remain the property of the insurance company" is true only in the most technical sense, and in this technical sense only by regarding the "annuity policy" as a true annuity contract. Actually, since the annuitant's death requires the company to pay the face amount of the life policy and since *LeGierse* refused to accept the proposition that the normal insurance reserves bore the risk of this payment, the source out of which the death payment is made must be the combined premiums paid by the decedent.

A corollary of the taxpayers' view of what happens to the annuity payment on death is their view of the nature of the payments to the decedent during life. As we have already noted, they consider that the payments are true annuity payments, consisting partially of income and partially of returns of capital. In other words, the

taxing statute is supposed to view the company as possessing two funds—one of which is being consumed during the decedent's life in the form of annuity payments, and the other of which the company holds separately, with the income being accumulated and added to corpus for payment to the owners of the life policy. (Resp. Br. 20–23.) This artificial concept of two funds, separately held, with one being diminished by payments out of capital and the other being augmented by accumulations of income exactly equal to the amount of capital paid out of the annuity fund is, we submit, also contrary to the reasoning of *LeGierse* which looked to the total consideration paid in the form of two premiums and which refused to separate them to create distinct annuity and insurance reserves. As is fully developed in our opening brief, it is more consonant with the realities of the situation to consider, just as would be true if there had been a single contract and a single premium, that the entire net premium paid under both contracts is held intact by the company to satisfy the death payment and that what is paid during the decedent's lifetime represents an agreed rate of return on that fund. It follows that the decedent retained the only income that was earned by the investment made in the form of separate premium payments. The various mathematical computations employed by the taxpayer (Br. 22–23, 42) establish nothing whatsoever since they are based on the fallacious

assumption that separate funds were involved, one having the characteristic of a true annuity fund and the other the characteristic of a true insurance reserve.

(b) When *LeGierse* ruled (pp. 540–541) that these contracts "must be considered together" and that, so considered, they present no insurance risk, the opinion was doing more than merely reiterating the admitted fact that the company required the annuity contract to be purchased as a condition for issuing the life policy without a medical examination. It was describing a continuing relationship between the related contracts and funds supplied by the decedent—a relationship which, of necessity, continued at least until the company had satisfied its obligation under the life policy. The continued existence of this unity is, quite clearly, essential to the holding that the proceeds of the life policy came, in effect, from the decedent's investment and not from the reserves supplied by other policy holders. And, since the true source which enables the company to make a payment on the death of an uninsurable person would obviously not be affected by an assignment of the policy, observed (p. 541) that the two contracts would continue to counteract each other "no matter who held the policy and the annuity."

The taxpayers, as is apparent from the preceding analysis, proceed from the premise that the fund held by the company became fragmented

and that the character of the payments which it was to make became altered by the mere fact that the decedent had assigned the life policy. It is sufficient to observe that the taxpayers point to nothing which would establish the validity of this proposition or which would at all detract from the explicit contrary statement in *LeGierse,* quoted above.

2. The examples given by the taxpayer (Br. 16–18) in an attempt to detract from our position, actually demonstrate how the taxpayers misconceive the issue presented by this case. The taxpayers liken the situation here to one where a person desires to buy a particular item of property to be given to a son, but cannot acquire that particular item without also buying another item. He buys both, gives one to his son and retains the other. We agree that no estate tax would be due on the property given away, even though the donor was originally required to acquire a combination of properties.

That, of course, has nothing to do with this case. The combination of contracts here, unlike the examples given, was required, not to satisfy some whim of the insurance company, *but because the contracts turn on the decedent's death.* The $72,000 payment the decedent's children received at her death was received because of her death and because the decedent, during her lifetime, transferred a sufficient fund to enable the company to make the payment at her death.

Code Section 811 (c) (1) (B) is applicable, not because this was a simple combination of contracts, but because it was a combination which terminated at death, which enabled the children to receive this sum at death, and which permitted the decedent to receive the earnings on the fund during her lifetime.

In this regard, it should be noted that the taxpayers also misconceive the issue when they state that the decedent (Br. 7–8) "could have accomplished her purpose just as well by simply buying the annuity policy, and making a gift of cash to the transferees in the amount of the premium allocated to the life policy." First, the decedent's purpose was to give her children $72,000 at her death—not the $53,000 premium allocated to that policy, and the children actually received the former amount, not the latter. The decedent could not have accomplished this objective except by taking out the combination of policies. Second, in every case where there is a reservation of a life estate with a vested remainder in others, the decedent could have made an *inter-vivos* transfer to the donee of an amount equal to the present value of the remainder. It is, of course, no answer to the applicability of Section 811 (c) (1) (B) that the decedent could have made a different, nontaxable transfer.

3. The taxpayers make much of the point that the children could have taken down the cash

surrender value of the life policy at any time (Br. 27–29) and that the payment to the decedent would have continued during the balance of her life (Br. 20). In our opening brief (pp. 18–22), we demonstrated why it is that the events which existed at the decedent's death are determinative and why it is unnecessary to consider what the taxable situation would have been if the children had been content to take a lesser sum prior to death. Further, it should be observed that if the unity of the contracts had actually been severed by payment of the cash surrender value of the life policy (an unlikely circumstance where the life of an uninsurable person is involved), so that the company would have assumed the risk of an ordinary annuity—that the annuitant would outlive life expectancy—the character of its payments would necessarily have become altered since it no longer would possess a hedging contract. But this does not establish at all that, in the absence of severance, the character of the payments should be determined by what they would have been had there been a severance.

CONCLUSION

The decision of the Court of Appeals is erroneous and should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

October Term, 1952

No. 566

CARTER H. HARRISON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, *Petitioner*

v.

EDWIN J. BOHNEN, EXECUTOR OF THE ESTATE OF MARY A. BOHNEN, AND INDIVIDUALLY; THEODORE G. BOHNEN AND VIRGINIA E. BOHNEN

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR REHEARING

The Acting Solicitor General, on behalf of petitioner, respectfully prays for a rehearing of this case before a full bench.

Certiorari was granted in this case on March 9, 1953, with all Justices of this Court participating in the consideration of the petition. Journal, p.

153. The case was argued on April 29, 1953, before a bench comprised of eight Justices; Mr. Justice Jackson was not sitting on that day. Journal, p. 200. A judgment of affirmance by an evenly divided court of eight Justices was entered on May 4, 1953, with a notation that Mr. Justice Jackson took no part in the consideration or decision of the case. Journal, p. 207.

This petition for rehearing is predicated on the assumption that Mr. Justice Jackson took no part in the consideration or decision of this case only because of his absence from the bench during the oral argument. Since Mr. Justice Jackson participated in the granting of the writ, it would appear that, after he recovers from his present illness, an argument could be had before the full bench.

This Court frequently granted a rehearing following a decision by an equally divided court, especially when a Justice who did not participate in the original decision was available to participate on rehearing. *Home Insurance Co.* v. *New York*, 119 U.S. 129, 148, 122 U.S. 636, 134 U.S. 594; *Selma, Rome & Dalton R.R. Co.* v. *United States*, 122 U.S. 636-637, 139 U.S. 560; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, 586, 158 U.S. 601, 602-607; *United States* v. *Grimaud*, 216 U.S. 614, 615, 220 U.S. 506; *United States* v. *Sischo*, 260 U.S. 697-698, 260 U.S. 701, 262 U.S. 165; *United States* v. *One 1936 Model Ford V-8 De Luxe Coach*, 305 U.S. 564, 305 U.S. 666, 307 U.S. 219; *Gray* v.

Powell, 312 U.S. 666, 313 U.S. 596, 314 U.S. 402; *Haliburton Co.* v. *Walker*, 326 U.S. 696, 327 U.S. 812, 329 U.S. 1; *MacGregor* v. *Westinghouse Electric & Mfg. Co.*, 327 U.S. 758, 327 U.S. 812, 329 U.S. 402, *Bruce's Juices* v. *American Can Co.*, 327 U.S. 658, 327 U.S. 812, 330 U.S. 743.

This case is an appropriate one for rehearing. The decision of the Court of Appeals, which has been affirmed only because of the equal division of this Court, is in conflict with the decisions of two other courts of appeals (*Conway* v. *Glenn*, 193 F. 2d 965 (C.A. 6th), and *Burr* v. *Commissioner*, 156 F. 2d 871 (C.A. 2d), certiorari denied, 329 U.S. 785), on a recurring question of importance in the administration of the federal estate tax. Since the Courts of Appeals for the Second and Sixth Circuits presumably will continue to apply the statute in the same manner as they did in the *Conway* and *Burr* cases, the existing conflict can be resolved only by a decision of this Court in which a majority of the Justices concur. Since no such decision has been made here, it is inevitable that there will be continued litigation of this issue in the lower courts and a continuing conflict of decisions among the Courts of Appeals. The longer such conflict on an important question of federal law remains unresolved, the greater the litigation-breeding uncertainty which will burden the lower federal courts and the bar. This unsettled state of the law can be avoided if, on rehearing, the issue in the

present case can be decided by a majority of the Justices of this Court.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

I certify that this petition is presented in good faith and not for delay.

ROBERT L. STERN,
Acting Solicitor General

May, 1953.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 566

CARTER H. HARRISON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE,
Petitioner,

vs.

EDWIN J. BOHNEN, EXECUTOR OF THE ESTATE OF MARY A. BOHNEN, AND INDIVIDUALLY; THEODORE G. BOHNEN AND VIRGINIA E. BOHNEN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONSE TO PETITION FOR REHEARING.

WILLIAM M. EMERY,
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THE BLAKELY-DARREN PRINTING COMPANY, CHICAGO

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RESPONSE TO PETITION FOR REHEARING.

Respondents respectfully pray that the Court deny the petition for rehearing. A definitive ruling on the underlying tax issue is not required by grave public interest. The instant case involves an estate tax problem, interesting but of comparatively minor importance, that has arisen infrequently in the past and has become moot under the present statutes. Rehearing and reargument will impose an unjustifiable burden upon the Court, as well as upon respondents.

REHEARING SHOULD BE DENIED UNLESS REQUIRED BY GRAVE PUBLIC INTEREST.

Petitioner states that this Court frequently granted a rehearing following a decision by an equally divided court. In support of this proposition he cites ten cases, spanning a period of about sixty years—1886 to 1945.

It is submitted that the true test, consistently applied by the Court, is whether or not the issue in the case is of such national importance as to justify burdening the Court and the parties with reargument and reconsideration.

Petitioner's earliest citation (*Home Insurance Co.* v. *New York*, 119 U. S. 129, 148, 122 U. S. 636, 134 U. S. 594) was so explained a year after that decision in *Shreveport* v. *Holmes* and related cases, 125 U. S. 694 (1887). The Court, by Mr. Chief Justice Waite, stated:

> "These petitions are denied. The rehearing was granted in *Home Insurance Co.* v. *New York*, 119 U. S. 129, after a decision by a divided court, because an important constitutional question was involved. The questions in these cases are not of that character."

The other cases cited by petitioner in which rehearings were granted also involved issues of grave national significance. One involved the constitutionality of the income tax, the fundamental power of the Federal Government to impose this tax without apportionment in accordance with the national census. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 586, 158 U. S. 601, 602-607. Another involved the extent to which Congress could delegate legislative power to Federal administrative officers. *United States* v. *Grimaud*, 216 U. S. 614, 615, 220 U. S. 506. Others involved broad considerations of trade

r commerce.[1] These were issues imperatively demand-
ng determination by this Court.

Even where the issues are important, further objections
rise to rehearings. In *Brown* v. *Aspden*, 55 U. S. 25
1853), the basic issue was deemed of such importance
hat the Court had allowed counsel a full week for argu-
nent. The decision below was affirmed by an equally di-
ided Court. Rehearing was sought and denied. After
eviewing the practice concerning rehearings in both the
Inited States and England the Court concluded that grant-
ng rehearings tended toward carelessness in the argu-
nent and consideration of cases in the first instance, as
well as unjustifiable delay and expense. The Court, speak-
ng through Mr. Chief Justice Taney commented upon the
effect of an equal division as follows:

> "Nor is the circumstance, that a decree is affirmed by a divided court, any reason for ordering a reargument before a full bench in any case. In a body as numerous as this, it must often happen, from vari-

1. *Home Insurance Co.* v. *New York*, 134 U. S. 594 (1890) (constitutionality of state tax with relation to U. S. tax-exempt bonds); *Selma, Rome & Dalton R. R. Co.* v. *United States*, 139 U. S. 560 (1891) (status of claims against U. S. where funds for payment seized by Confederacy); *Pollock* v. *Farmer's Loan & Trust Co.*, 158 U. S. 601, 602-607 (1895) (power of U. S. to impose income tax without apportionment according to census); *United States* v. *Grimaud*, 220 U. S. 506 (1911) (power of Congress to delegate legislative power to executive department); *United States* v. *Sischo*, 262 U. S. 165 (1923) (construction of statute vital to combating of smuggling and dope traffic); *United States* v. *One 1936 Ford V-8 De Luxe Coach*, 307 U. S. 219 (1939) (relation between government right of forfeiture and property rights of individual); *Gray* v. *Powell*, 314 U. S. 402 (1941) (extent of judicial review of administrative legal determination); *Halliburton Co.* v. *Walker*, 329 U. S. 1 (1946) (scope of protection of combination patents); *MacGregor* v. *Westinghouse Electric & Mfg. Co.*, 329 U. S. 402 (1947) (right of patent licensee to defend suit for royalties on grounds of invalidity of patent, misuse of patent by patentee, and invalidity of price-fixing agreement); *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743 (1947) (effect of violation of Robinson-Patman Act upon legality of sales contracts).

> ous causes, that the bench is not full. And experience has shown, that it has rarely happened that every judge has been present every day throughout any one entire term. The case before us is certainly an important one, in its principles and in the amount in dispute. But there are many cases on the docket at every term of the court much more important in both respects. And if it is to be understood, that cases of this description are not to be finally decided without the concurrence of a majority of the whole bench, it would be an useless consumption of time to hear them in the absence of any one judge, because it would be uncertain whether a judgment could follow after the argument. And it is easy to foresee the inconvenience, delay, and expenses to which a practice of that kind would subject the parties, and the uncertainty and confusion it would produce (to the great injury of other suitors) in the order of business as it stands on the docket of the court."

A factor that is of serious importance is the existing pressure of business upon this Court. The time and energy of justices is not unlimited. That their burdens may be manageable, the justices have been given and have freely exercised the power to deny further review to many litigants with worthy and important issues.

The additional time that would be devoted to reargument and reconsideration of this case would have to be taken away from some other case. We suggest that there is scarcely a proceeding in which a petition for certiorari is now pending, many of which must be denied because of the lack of time to consider them all, in which the underlying issues are not of considerably more importance and national significance than in the instant case.

A further consideration is suggested. Ordinarily a petition for rehearing is predicated upon the assumption that the justices concurring in the majority opinion have disregarded or misconceived some vital element of fact or

law, and have been misled by an error which can be corrected upon rehearing. No such consideration prevails in the instant case.

THE ISSUE IN THIS CASE IS NOT OF NATIONAL IMPORTANCE OR BROAD APPLICATION.

The instant case arose during an era of transition in the estate tax treatment of life insurance, and prior to the adoption of new policies and rules by Congress. The Revenue Act of 1942, enacted October 21, 1942, provided for inclusion in the gross estate of insurance upon a decedent's life where he had paid the premiums or other consideration for the insurance, whether or not he possessed any of the incidents of ownership in the insurance. This new rule was expressly made inapplicable to premium payments made before January 10, 1941, if at no time thereafter the decedent possessed an incident of ownership in the policy. On this latter date, the Treasury Department had amended its estate regulations to adopt this same test. This amendment likewise provided that the insurance was includible only to the extent that the decedent had paid premiums after January 10, 1941. The 1942 legislation also eliminated the special $40,000 exclusion for life insurance proceeds.[2]

2. I. R. C. Sec. 811 (g) was amended by Sec. 404 (a) of the Revenue Act of 1942, to read as follows:

"(g) Proceeds of Life Insurance.—

(1) Receivable by the Executor.—To the extent of the amount receivable by the executor as insurance under policies upon the life of the decedent.

(2) Receivable By Other Beneficiaries.—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his

Under these comprehensive new rules, now in effect for over twelve years, the issue in this case cannot arise. It has become moot. Whether or not it might have been important in the past is immaterial. Today it is plain that the definitive settlement of this bygone issue by this Court cannot compete in importance with the many other problems pressing for its decision. It has already perhaps had more time and attention from this Court than it properly deserves.

Disagreement among the Courts of Appeals may attest to the difficulty of an issue but not to its importance. Disagreements and litigation arise as readily over small matters as over large ones. The Courts of Appeals must take what cases come to them, though the solution of the issues be important only to the parties or their counsel. Petitioner in this case has had the benefit of the careful consideration and judgment of the District Court and the Court of Appeals. The fact that other courts may have different views is not a good ground for further intrusion upon the affairs of this Court.

Although petitioner describes the issue here as a recurring question, the fact is that it has arisen in only three

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death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. * * *"

The 1942 amendment was effective as to estates of decedents dying after October 21, 1942, except as provided by Sec. 404 (c) of that Act as amended. Sec. 404 (c) of the Revenue Act of 1942, as amended by Sec. 503 (a) of the Revenue Act of 1950, provides in pertinent part as follows:

"(c) Decedents to Which Amendments Applicable.—The amendments made by subsection (a) shall be applicable only to estates of decedents dying after the date of the enactment of this Act [October 21, 1942]; but in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy."

other litigated cases.[3] He cites no other case presently pending in the courts, and respondents' research has disclosed none. Nor under the circumstances is any flood of litigation to be expected.

The estate tax, like other Federal tax laws, is replete with existing and potential questions of interpretation. It would be an impossible task for this court, or even the Tax Court, to pass upon all of these. The great bulk of such problems are never even presented to the courts. They are disposed of by give-and-take negotiation, often upon a wholly arbitrary basis, between representatives of the Bureau of Internal Revenue and the taxpayers, in the protest and conference procedure which has long been used by the Bureau. While this may not be an ideal procedure, it has long been the best available and it has fared well under the tests of experience and practicality. Such few controversies as may hereafter arise over the issue in the instant case can, in all probability, be largely settled by this administrative process.

REHEARING WOULD ALSO IMPOSE AN UNFAIR BURDEN UPON RESPONDENTS.

While we recognize that the personal interests of litigants must be subordinated to the public interest, we venture to suggest an additional consideration bearing upon the requested rehearing.

Respondents have been subjected to great expense in connection with a rather modest estate. They have borne the expense of conference procedure incident to assessment of the tax, the processing of a refund claim, litigation in the District Court, and appeals to the Court of Appeals and this

3. *Estate of Reynolds* v. *Commissioner*, 45 B. T. A. 44 (1941); *Burr* v. *Commissioner*, 156 F. 2d 871 (C. C. A. 2, 1946), certiorari denied, 329 U. S. 785; *Conway* v. *Glenn*, 193 F. 2d 965 (C. A. 6, 1952).

Court. Although petitioner had had his full day in court after the first appeal, he asked for a further hearing in this Court on the ground that an issue of great public importance was involved. To a substantial extent, respondents' expense thereafter may be deemed to have been incurred in the public interest, rather than for their benefit.

The government now asks the Court to subject respondents to still further expense, for the stated reason that other controversies may arise and litigation thereof might be obviated by a second hearing in this Court. Respondents respectfully suggest that if another such case should actually arise and not be disposed of by administrative settlement:

(1) The government would have an opportunity to present it to this Court for determination if it so desired.

(2) No greater burden would then be imposed upon the Court in hearing argument and determining that case than would be involved in reargument and reconsideration of the instant case; indeed, it would have the benefit of additional views of the lower courts and of new counsel.[4]

(3) The expense burden of obtaining such a determination in the public interest would be shared by other litigants who were immediately concerned, rather than by respondents who have already borne their full share of this burden.

(4) There is an element of public interest in the point that a taxpayer should not be deterred from asserting a just claim by the prospect of unnecessary expense.

4. If it be assumed that the question would then be regarded as of sufficient importance to justify hearing at all, such a determination would seem preferable to decision by a single Justice, which is the essence of the instant request for rehearing.

CONCLUSION.

It is respectfully requested that the petition for rehearing be denied.

Respectfully submitted,

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May 26, 1953.

Per Curiam Decisions.

No. 566. HARRISON, COLLECTOR OF INTERNAL REVENUE, *v.* BOHNEN, EXECUTOR, ET AL. Certiorari, 345 U. S. 903, to the United States Court of Appeals for the Seventh Circuit. Argued April 29, 1953. Decided May 4, 1953. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE JACKSON took no part in the consideration or decision of this case. *Lee A. Jackson* argued the cause for petitioner. With him on the brief were *Acting Solicitor General Stern, Assistant*

Attorney General Holland, Ellis N. Slack and *Hilbert P. Zarky*. *George S. Stansell* argued the cause and filed a brief for respondents. Reported below: 199 F. 2d 492.